Adverse possession and the limitation of actions to recover land.

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ADVERSE POSSESSION AND THE LIMITATION OF ACTIONS TO RECOVER LAND

by

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ABSTRACT

This thesis examines the objectives of the law governing the limitation of actions to recover land and considers the extent to which the law is framed to meet and does meet those objectives.

The three aims which are traditionally attributed to the Statute of Limitations - the avoidance of stale claims, of claims giving rise to hardship and the encouragement of diligence in claimants - are first examined. But it is concluded that these three reasons do not adequately explain why the law of adverse possession is as it is.

It is then suggested that, in relation to claims to recover land, the Statute has in fact a fourth objective - to facilitate the investigation of title in unregistered conveyancing.

The thesis seeks to establish the case for this suggested aim in three ways; by reference to the aims of the Real Property Commissioners, who were originally responsible for framing the modern law; by tracing the history and development of the rules governing the period for which a title must be proved under a contract for the sale of land, and by reference to the provisions of the legislation itself.

The thesis also tries, at the same time, to judge the extent to which the law is properly adapted to achieve and does achieve its objectives, particularly its conveyancing objectives. The more important aspects of the legislation are measured against the identified objectives of the law, and the ways in which the rules operate against owners are considered.

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CHAPTER 1

INTRODUCTION

General

This thesis examines the objectives of the law governing the limitation of actions to recover land and considers the extent to which the law is able to and does achieve those objectives.

At first sight, the law of adverse possession has the appearance of an unprincipled and neglected backwater; and area of law in need of reform but which is not perhaps of great importance. How, it might be asked, could there be any rational explanation for depriving an owner of **property**, simply because of the long continued **possession** of another. And why should the law seem to ignore the demerits of a trespasser? Why should it protect a wrongdoer - a person whose conduct might be tantamount to theft - but whom the law may nevertheless aid even against an innocent owner - one who did not know and could not have discovered, that time had begun to run. Why should the long suffering of injury bar the remedy?

But first appearances may be misleading.

Summary of thesis

In this thesis it will be suggested that the law of limitation of claims to recover land is in fact of modern origin and based on intelligible principles. The three aims which are traditionally attributed to the Statute are first considered (Chapter 2). Those three objectives are the avoidance of stale claims, of hardship, and the encouragement of diligence in the pursuit of claims. But it is concluded that these three reasons do not adequately explain why the law of adverse possession is as it is. It is then suggested that, in relation to claims to recover land, the Statute has in fact a fourth objective - to facilitate conveyancing. The suggestion

is that one aim of the Statute is to make investigation of title in unregistered conveyancing simpler, quicker and cheaper by providing a guarantee that a title investigated for only a limited period will nevertheless be secure against older claims.

The thesis seeks to establish the case for this suggested aim in three ways. First, by reference to the stated aims of the Real Property Commissioners (first report, 1829) who were responsible for framing the modern limitation legislation. The origins of the modern law are considered in Chapter 3.

The second way in which it is sought to establish the accuracy of the hypothesis is by tracing the history and development of the rules governing the period for which title must be proved under a contract for the sale of land. It is suggested in Chapter 12 that this process demonstrates the connection between the rules and the limitation period.

The third way in which the hypothesis is supported, is by consideration of the provisions of the legislation itself. It is suggested that some of the rules cannot be explained in any other way.

In the concluding chapter of the thesis, it is submitted that these three 'proofs' establish that the Statute does have as one of its objectives the facilitation of unregistered conveyancing.

It is not, however, claimed that identification of the 'fourth objective' is in itself a novel discovery. That would be absurd - for it is argued here, not just that the Statute of Limitations can facilitate unregistered conveyancing, but that it was in fact originally consciously designed with that end in mind. Nevertheless, it is hoped that, in dealing with the 'fourth objective', the thesis does amount to something more than a mere recitation of an obvious and widely understood truth at tedious length. The length may be tedious. But it is suggested that the 'fourth objective' is neither obvious nor widely understood. For although the Statute was deliberately designed with this aim in mind, in some curious way, this

aim of the legislation seems to have slipped from general legal consciousness. It is difficult to explain why this occurred.

One reason, no doubt, is that the legislation does not make its aims clear. And certainly the policy of the legislation is only rarely discussed in modern decisions and textbooks, and then only partially or eliptically. It can of course be collected and reconstructed (as this thesis attempts to do) by analysis and from the Reports of Commissions and Committees - but these documents are not widely available and are not, in any event, widely favoured reading. Probably the most important reason is that the aims of the legislation rarely need to be thought about in professional practice. The frame of the Statute is such that when the rare limitation defence to a possession action is encountered in the courts, there is usually little need or temptation for the advocate to ponder on the aims of the legislature. Nor is there any similar temptation for conveyancers. A practitioner investigating a paper title will not (quite rightly) nowadays generally think of the possibility of an unknown, outstanding estate as being a serious risk. It is just possible, therefore, that the paradoxical reason that the conveyancing objective of the Statute is not more generally appreciated, may be that the Statute has been so successful in achieving its aims that the existence of the underlying policy has been obscured. If this is correct, then the statement of the Real Property Commissioners that

> "We know by experience that a regulation which on a slight view appears inexpedient, may be found on a further examination to be judiciously framed to meet mischiefs which are not perceived, because it represses them." [1]

would take on an almost prophetic quality.

However, to summarise, whatever the reason may be, the argument in this thesis that the State of Limitation facilitates conveyancing, is

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1. Real Property Commissioners, First Report, 1829, p.9.

not an original idea. The process is one of disinterment of the idea rather than original creation of it.

So much for the objectives of the Statute. But the thesis does not only attempt to identify the general aims of the law governing the limitation of actions to recover land. It also tries, at the same time, to judge the extent to which the law is properly adapted to achieve and does achieve its objectives, particularly its conveyancing objectives. The question whether the Statute is or can be fully adapted to achieve its objectives requires discussion not only of the aims of the legislation, but also of the way in which it affects the persons against whom it operates. A brief outline of the nature of this problem is included here.

Now in theory, at least, it would be quite possible to devise a limitation rule which would ensure that the law achieved its objectives more frequently and more fully than the present rules are able to. For example, if the limitation period were substantially reduced, e.g. to 6 months, and no excuses, exceptions or extensions were permitted, then probably judgments on stale claims or which cause hardship to defendants would be even less likely than they are now. With such rules, it might even be possible to further reduce the period of proof of title. But of course, such draconian rules would often operate unfairly as between the parties to disputes. Clearly, a satisfactory limitation rule must not think merely of the general objectives of limitation. It must try to draw a balance between its own general aims and the need to be fair and do justice to individual claimants.

It is with the way in which this balance has been drawn that this thesis is concerned when it deals with the question of the extent to which the law is properly adapted to achieve its objectives.

One particular aspect of this process of balancing conflicting interests presents a familiar problem for the student of land law. For one objective

of the Statute (it is suggested) is to facilitate conveyancing. But in achieving its objectives, the Statute must not go to impossible lengths so that it unjustifiably operates to deprive innocent owners of their property. It must ensure that owners enjoy reasonable security of ownership, and that land cannot be permanently lost to squatters too easily. In other words, the law has to draw a balance between facilitating conveyancing and ensuring that owners enjoy reasonable security of ownership. At least in this context, therefore, adverse possession does not present a unique problem. On the contrary, this is a typical land law problem, since it deals with an instance of what has been called "the central dilemma of the law of property"[2], which is the need to reconcile security of ownership with ease of transfer. So here at least, the problem posed by the law of adverse possession is not without parallel.

But if the general nature of one of the problems dealt with in this thesis is not unique, nevertheless this area of law does have its fair share of difficulties:

> "The law of limitations is beset with difficulties of every kind - difficulties in its very nature, from the variety of subjects, objects, and interests with which it is conversant; difficulties created by the frame of the act; and difficulties springing and capable of accumulating indefinitely, from decisions not founded on large and mature views of its provision."[3]

Examples of the types of difficulty listed by Hayes will be found in all the following chapters of this thesis. These difficulties have given the law of adverse possession what appears at times to be an almost labyrinthine quality; and the intricate and tortuous arrangement and detail of the rules have gained the subject a reputation for being unprincipled. But these difficulties have also meant that, in some parts of this thesis, a good deal of space has to be devoted to unravelling the complexities of

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2. Megarry & Wade, 4th ed., 1084.
3. Hayes, Conv. 5th ed., (1840), 272.

the rules, as a prelude to consideration of their aims and their adequacy. However, before starting on that process, a more detailed outline of the thesis is necessary.

Outline of Thesis

The final part of this chapter outlines the modern law of adverse possession and the limitation of actions. Chapter 2 examines general purposes of the law of limitations. In Chapter 3 the specific policy of the law limiting claims to recover land and its origins are dealt with. Chapters 4 to 10 deal with the general requirements and the events which must occur before time can start to run. Chapters 11 and 12 deal with the length of the limitation period and the cases in which the ordinary time limits are extended or excluded. Chapters 12 to 15 deal with the effect of the lapse of time and the special rules relating to registered land. More general considerations are then dealt with in the concluding chapter.

Outline of the law of limitation of claims to recover land

The law relating to the limitation of actions to recover land and rent is now governed by the Limitation Act 1980 which consolidates the Limitation Acts 1939 to 1980. The 1939 Act itself consolidated, with amendments, earlier statutes dealing with claims to recover land, the Real Property Limitation Acts, 1833 and 1874.[4] Thus it will often be necessary in this thesis to consider cases, statutes, reports and other works which pre-date the 1980 Act.

The 1980 Act is divided into three parts. Part I (ss. 1-27) sets out the ordinary time limits for different classes of action. As far as proceedings to recover land are concerned, the principle of the Act is that no

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4. Other relevant statutes consolidated in 1939 include the Crown Suits Acts, 1796 and 1861, the Limitation of Actions Act, 1843 and certain provisions of the Trustee Act, 1888.

action may be brought after the lapse of a prescribed period from the accrual of the cause of action. "Land" for the purposes of the Act is defined to include corporeal hereditaments, tithes and rent charges and any legal or equitable interest therein, including an interest in the proceeds of sale of land but otherwise it does not include any incorporeal hereditaments such as easements or profits.[5]

"Action" in the 1980 Act bears a similarly extended meaning and includes any proceeding in a court of law[6] and further, making an entry into possession or distraining for arrears of rent or tithe.[7]

The ordinary limit for actions to recover land is 12 years, calculated from the date on which the right of action first accrued.[8] Part I of the Act (together with Schedule 1, part 1) contains a set of provisions for determining the date of accrual of rights of action to recover land. But the Act does not lay down an exhaustive code. In any case not covered by the express provisions, the date when the cause of action accrues depends on the general law.[9]

In the case of present interests in land, paragraph 1 of Schedule 1 provides that where the person bringing the action (or a predecessor) has been in possession of the land, a right of action to recover it shall be

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5. Section 38 (1). But the Act does not affect prerogative rights to any gold or silver mine (s.37(6)); or title of the National Coal Board to any coal or mines of coal: Coal Industry Nationalisation Act 1946, s.49(2), Interpretation Act 1978, s.17(2)(a).
6. Section 38 (1).
7. Section 38 (7).
8. Section 15 (1), reduced to 6 years for certain "future interests", s.15(2).
9. E.g. (i) As in the case of leases in writing, and as in (ii) **Lloyd's Bank v. Margolis** [1954] 1 All E.R. 734; legal charge to secure account - covenant to repay on demand - cause of action did not accrue on general principles until demand; and (iii) **Lakshmijit v. Sherani** [1973] 3 All E.R.737, P.C. (Contract for sale of land for price payable by instalments - on default vendor had alternative remedies in contract - either to enforce contract or to rescind and re-enter. Vendor's right of action did not accrue until he exercised right to rescind and communicated that fact to purchaser).

treated as having accrued on the date on which he was dispossessed or discontinued his possession. This provision is, however, modified **(a)** in certain cases where the claimant is bringing an action to recover the land of a deceased person - the right of action is then treated as having accrued on the death of that person; and **(b)** where the claimant is bringing an action to recover land assured to him (or a predecessor) otherwise than by will - the right of action is then treated as having accrued when the assurance took effect.

But the provisions dealing with accrual of a right of action in the case of present interests take effect (like all the provisions of part 1 of the first schedule) subject to the qualification contained in paragraph 8 of the schedule. That paragraph provides that no right of action shall accrue or continue unless there is "adverse possession" of the land.

The meanings of "possession", "dispossession", "discontinuance" and "adverse possession" and their relationship are discussed at length in Part III of this thesis.

In the case of future interests, Part I of the 1980 Act also contains "deeming" provisions fixing the date of accrual, in certain cases, of a right of action to recover the land:

Future estates or interests: Time runs from the date on which the estate or interest falls into possession.[10] But the period is reduced to 6 years if adverse possession began more than 12 years before the reversion/remainder fell into possession.[11]

Leases: In case of periodic tenancies without a lease in writing, time runs from the expiration of the first period, or date of last receipt of rent if later.[12] For leases in writing reserving a rent of £10 a year or more, time runs against the landlord from the date of first receipt

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10. Schedule 1, para. 4.
11. Section 15 (2).
12. Schedule 1, para. 5.

receipt of rent by a third party.[13] In cases of forfeiture or breach of condition, time runs from date forfeiture was incurred or a condition broken.[14]

Entails: There are special rules in the case of entailed interests which provide, on the one hand, that once time begins to run against the tenant in tail in possession, it also runs against the issue in tail and the remaindermen[15] and, on the other hand, which will cure a defective dissentailing assurance so as to bar the issue in tail and the remainderman.[16]

Trusts: The Act applies to equitable interests in land (or in the proceeds of sale of land held on trust for sale) just as it applies to legal estates.[17] But the title of a trustee will not be barred by the running of time unless all beneficiaries have also been barred.[18] And notwithstanding that a trustee's own right of action would otherwise have been barred by the Act, he may nevertheless bring an action to recover the land on behalf of any beneficiary whose own right of action has not been barred.[19]

No period of limitation applies to an action by a beneficiary to recover trust property (or proceeds) from a trustee.[20] Nor will time run against a trustee or co-beneficiary in favour of a beneficiary unless that person is solely or absolutely entitled to the land or the proceeds.[21] The consequences of these rules in cases of co-ownership are discussed later.

Mortgages:

(a) Mortgagor. The Mortgagor's right to redeem is barred (subject to

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13. Schedule 1, para 10.
14. Schedule 1, para 11.
15. Section 15 (1) (3); section 38 (5).
16. Section 27.
17. Section 18 (1); section 38 (1).
18. Section 18 (2), (3).
19. Section 18 (4).
20. Section 21 (1).
21. Schedule 1, para. 9.

to Part II of the Act) if the Mortgagee remains in possession of mortgaged property for 12 years.[22]

(b) Mortgagee. The Mortgagee's remedies for enforcement of the mortgage are all barred subject to Part II of the Act) 12 years after the date on which the right to foreclosure or the date on which the right to receive the principal accrued.[23] A period of 6 years is prescribed for actions to recover morgage interest.[24]

Rent Charges: The owner's rights are barred 12 years after the date of last receipt of rent, if rent ceases to be paid.

Although the ordinary time limit for actions to recover land is 12 years, longer periods of limitation (30 years) are provided for actions to recover land by the Crown or by any spiritual or eleemosynary corporation sole[25] and for actions to enforce advowsons. A specially extended period (60 years) applies to actions brought by the Crown to recover foreshore.[26]

Part II of the 1980 Act provides for the extension of the limitation period in case of disability,[27] for the fresh accrual of a cause of action in case of acknowledgement or part payment[28] and for postponement of the limitation period in case of fraud, concealment or mistake.[29] Subject to these provisions, the general rule is that where an action has once accrued and time has begun to run, then it runs continuously.

After the expiry of the period prescribed by the Act for any person to bring an action to recover land then, subject to section 18 (settled land and land held on trust) and section 75 of the Land Registration Act

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22. Section 16.
23. Section 20 (1), (4).
24. Section 20 (5).
25. Schedule 1, para. 10.
26. Schedule 1, para. 11.
27. Section 28.
28. Section 29.
29. Section 32.
30. **Rhodes v. Smethurst** (1804) 6M. & W. 351.

1925 (both considered later), the title of that person to the land is extinguished.[31] (The nature of the title acquired by a squatter is discussed in Part V of this thesis). Part III of the Act contains miscellaneous and general provisions governing the Act's application.

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31. Section 17.

PART II

CHAPTER 2

THE PURPOSES OF LIMITATION (1)

General

The purposes of the law of limitation have been authoritatively stated to be[1]:

1. to protect defendants from stale claims;
2. to encourage plaintiffs not to sleep on their rights; and
3. to ensure that a person may feel confident, after the lapse of a given period of time, that an incident which might have led to a claim against him is finally closed.

Although this list was originally formulated in relation to personal injury claims, it has also been said to be applicable to all types of action, including actions to recover land.

The first of these three purposes, and a reason which covers some of the same ground as the third, were included in the well known statement of Best C.J. in **A'Court v. Cross**[2]:

> "It has been supposed that the Legislature only meant to protect persons who had paid their debts, but from length of time had destroyed the proof of payment. From the title of the Act to the last section, every word of it shows that it was not passed on this narrow ground. It is, as I have often heard it called by great judges, an act of peace. Long dormant claims have often more of cruelty than of justice in them. Christianity forbids us to attempt enforcing the payment of a debt which time and misfortune have rendered the debtor unable to discharge. The Legislature thought that if a demand was not attempted to be enforced within six years, some good excuse for non-payment might be presumed, and took away the legal power of recovering it."

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1. Report of the Edmund-Davies Committee on Limitation in cases of personal injury, (1962) Cmnd. 1829, para. 17.
   Law Reform Committee, 20th Report, para. 23; 21st Report, para. 1.7., (1977), Cmnd. 6923.
2. (1825) 3 Bing 329, 332. Cited with approval, **Ampthill Peerage Case** [1976] 2 All E.R. 411, 423.

These sentiments are not confined to common law claims. Sir Thomas Plummer M.R. had spoken to similar effect five years earlier in the great equity cause of **Cholmondeley v. Clinton**[3]:

> "The statute is founded upon the wisest policy, and is consonant to the municipal law of every country. It stands upon the general principle of public utility. **Interest reipublicae ut sit finis litium**, is a favourite and universal maxim. The public have a great interest, in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called in question. It is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation, exposing parties to be harrassed by stale demands, after the witnesses of the facts are dead, and the evidence of the title lost. The individual hardship will, upon the whole, be less, by withholding from one who has slept upon his right and never yet possessed it, than to take away from the other what he has long been allowed to consider as his own, and on the faith of which, the plans in life, habits and expenses of himself and his family may have been (as it is alleged in the present instance they were) unalterably formed and established - **Vigilantibus et non dormientibus lex succurrit".**

The Master of the Rolls remarks, which touch on all three of the purposes of limitation, are particularly pertinent since they were of course made in the precise context of a claim to recover land.

1. Stale Claims

The first ground mentioned by Chief Justice Best is important in the particular case of claims to recover land. The law of limitation of actions usefully guards against the problems which might otherwise be caused by the perishable nature of deeds and other documents, as well as all forms of testimony and the infirmities of human memory.

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3. (1820) 2 Jac. & W. 140; 4 Bli. 106;
See also **Manby v. Bewicke** (1857) 3 K. & J. 351

> "All Statutes of Limitation have for their object the prevention of the rearing up of claims at great distances of time when evidences are lost, and in all well regulated countries the quieting of possession is held an important element of policy..."[4]

In the nature of things, however, it is impossible to cite specific instances of cases in which a defendant has relied on the Statute after his title deeds have completely disappeared from sight and mind. Cases in which the defendant has known of deeds which he has later lost are also rarely to be found in reports, although applications for registration of title in such circumstances appear to have been quite common before the introduction, in 1967, of restrictions on applications for registration in non-compulsory areas.[5] Such cases are also encountered in unregistered conveyancing practice.

Although it is difficult (because of the lack of statistics detailing the frequency with which the defence of limitation is relied on), to speak with certainty, it seems probable that the effect of the Statute in barring stale claims is more important in cases **(a)** in which the deeds or documents in question are inadequate (rather than non-existent) and **(b)** in which the individual(s) concerned have not complied with or observed necessary formalities.

a. "Inadequate" documents

In practice, it is not unusual to find that even such documents of title as conveyances on sale do not precisely identify the boundaries of

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4. Per Lord St. Leonards, L.C., **Trustees of Dundee Harbour v. Dougall** (1852) 1 Macq. 321; see also **Thomson v. Eastwood** (1877) 2 App. Cas. 215, 248 (Lord Hatherly); Real Property Commissioners, First Rep. 39; Law Revision Committee, Fifth Interim Report, 1936 (Cmnd. 5334) 9 Brunyate, Limitation of Actions in Equity, p.190.
5. Ruoff, 27 Conv. (N.S.) 554;
Ruoff & Roper, Registered Conveyancing, 4th ed., 182.

the property to which they relate.[6] This is so even in the case of modern documents and even where the boundaries are of recent creation - e.g., in a housing development - and so well known to all concerned.

In such a case, possession of the land coupled with the effect of the Statute, may enable the boundaries to be determined at a later date and so make good the inadequacy of the original documents.[7] Indeed, it has been suggested that the operation of the Statute in making legal boundaries coincide with actual boundaries on the ground is one of the most important effects of the legislation.[8] This is a particular advantage in the too common case in which the boundaries of properties as drawn on a plan of a building estate, are not followed when the estate is built on the ground,[9] or in cases in which the original plans are inaccurate.[10]

b. "Informal transactions"

The Statute may also usefully avoid the dangers of adjudicating on stale claims in cases in which a valid and enforceable transaction has nevertheless not been completed with the required formalities, e.g., as in the case of an informally completed agreement to sell,[11] or on an informal exchange,[12] or realignment of boundaries or a partition.

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6. e.g. **Smout v. Farquharson**, unrep., C.A., 12.12. 1972, Bar Lib. No. 381; Michael Joseph, "The Conveyancing Fraud", p.53.
7. See for example:
   Kynoch v. Rowlands [1912] 1 Ch. 527;
   Cunliffe v. LNWR (1888) 4 T.L.R. 278;
   Norton v. LNWR (1879) 13 Ch. D.268;
   Marshall v. Taylor [1895] 1 Ch. 641.
8. Ruoff, 27 Conv. (N.S.) 353.
9. Ruoff, 27 Conv. (N.S.) 353;
   Ruoff & Roper, Registered Conveyancing, 4th ed., 332.
   But it may be less helpful in the case of leasehold developments as a result of the decision in **St. Marylebone Property Co. Ltd. v Fairweather** [1963] A.C. 510, discussed below.
10. Ruoff & Roper, p.212.
11. As in **Bridges v. Mees** [1957] Ch. 475, noted (F.R. Crane), (1957) 21 Conv. (N.S.) 385.
12. Ruoff & Roper, 326

However, an inflexible policy of refusing to permit the Court to adjudicate whenever there is a danger that the case is stale is a two edged sword; it is of course possible to envisage circumstances in which a plaintiff, rather than a defendant, might be prejudiced by the state of his evidence. For example, a written acknowledgement by the defendant (or predecessor) of the plaintiff's title, may be lost or an agreement for a lease or the nature of an occupation begun by permission may be forgotten. Nevertheless, it is often asserted that if there has been no attempt to enforce an old title over a period of years, then there must have been some good reason:[13]

"a man is not likely to sleep upon his claims if they are wellfounded"[14]

and it is assumed that, on balance, staleness is more likely to prejudice a defendant in possession rather than a plaintiff owner.

This assumption, however, is incapable of proof.

But whether staleness is more likely to prejudice claimant or occupier, it is submitted that the need to bar stale claims cannot be more than a partial explanation for the policy of the modern law of limitation of actions to recover land. Two reasons might be advanced to support this submission. First, the assumption which forms the basis of the argument for protecting defendants from stale claims - viz. that there must have been some good reason (now undiscoverable) for the plaintiff's earlier inaction - takes it for granted that an owner will generally be aware that a cause of action has accrued to him. But the Statute in fact operates in the case of actions to recover land even though the owner was unaware that time has begun to run.[15]

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13. Bl.Com.III, 188; cf. **A'Court v. Cross** (1825) 3 Bing. 329, 332; **Thomson v. Eastwood** (1877) 2 App. Cas. 215.
14. Brunyate, Limitation of Actions in Equity, p.191.
15. **Cholmondeley v. Clinton** (1820) 2 Jac. & W. 139;
Rains v. Buxton (1880) 14 Ch.D.537;
Craven v. Pridmore (1901) 17 T.L.R. 399;
Ocean Estates v. Pinder [1969] 2 A.C.19.

The second reason is that the Statute operates and will bar an action, even if the facts are undisputed and even though the defendant freely admits that he has never had even a pretence of right and that his possession was wrongful throughout the limitation period; "Staleness" cannot be the policy behind these rules. Indeed in several instances the Statute provides that an action shall be deemed to accrue in prescribed circumstances in which, **ex hypothesi**, the prescribed circumstances or facts being known, there can be no question of the possessor being prejudiced by lost or perished evidence.[16] For these reasons it is submitted that staleness, although an important consideration, cannot alone adequately explain the policy of the 1980 Act.

2. Diligence

"To encourage plaintiffs not to sleep on their rights"

This was the second policy objective of the law of limitations which was listed at the start of this chapter.

Although this object has frequently been suggested to be one of the purposes of the limitation of actions, it does not convincingly explain the policy of the 1980 Act in relation to claims to recover land. The Statute can only encourage an owner to protect himself if that owner knows (or possibly if he ought to know) that time has begun to run against him. But knowledge (actual or constructive) of the accrual of a cause of action is not a precondition for the operation of the Statute. Encouragement of owners cannot therefore be regarded as a major aim of the Statute in the present context. It appears in fact that this second objective is subsidiary and subordinate to the other objectives - it is desirable to encourage owners to early defence of their rights so as to avoid stale claims and possible hardship.

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16. E.g. 1980 Act, Sched. 1, para. 5, (tenancies from year to year without lease in writing).

In some instances this aspect of the policy of limitation has been formulated in a slightly different way and 'sleeping' has been considered as culpable,[17] so as to justify the Limitation Act. Again, however, it might be pointed out that knowledge or the means to knowledge on the part of the owner of the existence of a cause of action is not a precondition for the running of time. An owner's negligence or culpability cannot therefore be the sole reason for the Statute's existence.

3. Confidence

"To ensure that a person may feel confident, after the lapse of a given period of time, that an indident which might have led to a claim against him is finally closed"

This third suggested purpose of the law of limitation immediately provokes the question, why should the law wish to encourage such confidence in a potential defendant?

It is true that there are possible answers to the question in the case of certain types of action - e.g. personal injuries claims in which the real defendant is an insurer or similarly placed body. In such cases there may be good reason for wishing to encourage confidence that an incident has been closed and so for limiting certain types of claim in point of time.

But it is more difficult to find similar explanations which are appropriate in the case of actions to recover land from a squatter. In this sort of case the "risk" is not generally spread amongst many - by insurance or otherwise - but is usually born by the individual concerned. This third policy of limitation is clearly also more appropriate to causes of action which are based on a single incident rather than on a continuous state of affairs, as is the case in claims to recover possession. However, in

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17. See e.g. Hayes, Conv, I, 239; **Yardley v. Holland** (1875) 20 Eq. 428; **Adnam v. Sandwich** (1877) 2 Q.B. 485, 489.

certain circumstances, this third ground of policy may have some bearing on claims to recover land. For example, a mortgagor in possession who has paid neither principal nor interest for many years may legitimately wish to be assured that the mortgage can no longer be enforced against him so that he may deal with the land as unencumbered owner. Similarly, a mortgagee who has gone into and remained in possession for many years and has received no payments, may equally legitimately wish to be satisfied that the mortgagor's right to redeem has been barred. Nevertheless, these examples are special instances rather than being of general significance. There are however other possible ways in which this third head of policy might be thought relevant to actions to recover land.

a. "Balance of Hardship"

Both the passages from the judgements of Best C.J. and Plummer M.R. cited at the start of the chapter, rely on this ground. In the oft-quoted words of Chief Justice Best:

> "Long dormant claims often have more of cruelty than of justice in them". [18]

Sir Thomas Plummer stated the issue more directly:

> "The individual hardship, upon the whole, be less by withholding from one who has slept upon his right, and never yet possessed it, than to take it away from the other what he has long considered to be his own."[19]

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18. Cited above, note 2; see also Real Property Commissioners, First Report, 39; **Malone v. O'Connor** (1859) 9 Ir. Ch.R. 459; **Medicot v. O'Donnel** (1807) 1 Ball & B. 156; **Thomson v. Eastwood** (1877) App. Cas. 215, 248 (Lord Hatherley).
19. Cited above, note 3. Rather more floridly, Justice Holmes wrote that: "the true explanation of title by prescription seems to me to be that man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, cannot be displaced without cutting at his life".

To the same effect, more recently, in **R.B. Policies at Lloyd's v. Butler,**[20] Streatfield J. remarked that he was:

> "not suggesting that the plaintiffs in the present case are guilty of heartless or cruel conduct, but a claim, made 7 or 8 years after the motor car was stolen, against a perfectly innocent holder, who has given good consideration for it without knowledge that it was a stolen car, does not seem just. I think that an equal policy of the Limitation Act 1939, is to prevent injustice of this kind."

However, it is relevant to point out that Streatfield J. had held that the plaintiff's cause of action had accrued when the car was stolen and:

> "it was the misfortune of the plaintiffs that they were unable to pursue that cause of action through their ignorance of the identity of a possible defendant".

In the result, as Streatfield J. was aware, one of two equally innocent parties had to suffer.[21] But there was no discussion of the relative merits of the parties or of how "balance of hardship" could be assessed.

It seems in fact that it is impossible to design specific rules of limitation which will always accurately reflect the true balance of hardship.

Possibly, relative hardship might be determined by the Court on the facts of individual cases; but this would be an uncertain rule and is not the approach adopted by the Statute in relation to claims to recover possession of land.

"Balance of hardship" does not therefore appear to adequately explain the policy of the law in this area.[22]

b. <u>To encourage the use, maintenance and improvement of unoccupied land</u>

An almost uniquely experienced observer has commented that one of the most common types of squatter (usually a neighbour)

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20. [1950] 1 K.B. 76, 81.
21. [1950] K.B. 76, 82.
22. Hayes, Conv., I, 223.

> "begins by being a tentative trespasser and later emboldened, because not one comes forward to disturb him, gradually alters his occasional use of the land into something more permanent and later probably spends money, as well as time, upon its use and development".[23]

It is arguable that there is a certain public interest in promoting the full use of neglected natural resources and that it is desirable that a fixed time limit should exist to encourage the improvement[23] and development of land which might otherwise lie unused or underused for many years. However, this suggestion is not to be found in reported decisions and does not appear to have been an important influence on Parliament[24] or any of the Committees[25] which have reported on the law of limitation. The argument is in any event only relevant in limited circumstances and could not possibly explain the universal application of the limitation rule which, e.g., applies just as much to forcible ejection or possession under a mistaken belief of right as it does to stealthy encroachment and to land which has been abandoned.

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23. Ruoff, 27 Conv. (N.S.) 353,355;
This type of behaviour seems to be displayed in:
Smirk v. Lyndale Development Ltd. [1974] 2 All E.R.8;
Basildon v. Manning (1976) 237 E. Gaz. 879;
Leigh v. Jack (1879) 38 P. & C.R. 452;
Powell v. McFarlane [1979] 38 p. & C.R. 452;
Gray v. Wykeham-Martin, unrep, C.A., 17.1.1977;
B.R.B. v. G.J. Holdings, unrep. C.A., 25.3.1974.
24. But for a rare exception, see the statement made by Lord Hailsham in moving the second reading of the Limitation Amendment Bill 1980; Hansard, Vol. 400 (H.L.) 1232; this instance is considered in detail in Chapter 8 (below).
25. The argument may have had greater effect in other jurisdictions; see: 1976, Registrar General's Office, NSW, "Working Paper on Application to Torrens Title land of laws relevant to Limitation of Actions".

Summary

In concluding this chapter, it is submitted that none of the most commonly advanced reasons for quieting disputes between individuals adequately explains the policy of the modern law of limitation of actions to recover land. It is further submitted that another explanation - the need to ensure certainty of title in the interests of the security and marketability of all land - can be identified as an important objective of the modern legislation. In the following chapter, this policy will be outlined and its origins traced.

CHAPTER 3

THE PURPOSE OF LIMITATION (2)

General

In the last chapter it was concluded that none of the three most commonly advanced reasons for quieting disputes between individuals adequately explains the modern law of limitation of actions to recover land. The Statute has, however, a fourth policy objective which takes account of more than the mere personal interests of individual litigants.[1]

> "The Statutes of Limitation are not simply for the purpose of quieting rights between individuals, but they are founded on public policy..."[2]

In this thesis it will be argued that one of the strands which go to make up public policy in this area is the desire to facilitate the investigation of title to unregistered estates and that this objective has had an important effect in shaping the modern law of limitations.

This chapter first outlines the way in which it is suggested that the Statute is intended to facilitate conveyancing. The chapter then goes on to deal with the first of the three ways in which it is proposed to support that hypothesis. The first of those "three proofs" is to be found in the stated aims of the Real Property Commissioners who were responsible for the Real Property Limitation Act 1833 which established the framework and most of the detail of the modern law of limitation of claims to recover land. This chapter therefore considers the law as it was before the Act of 1833, the defects in it, the consequences of those defects and the aims of the Commissioners in recommending reform. But first, a brief outline of the general policy is necessary.

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1. Real Property Commissioners, First Report (1829), 41,45; Hayes, Conv., 5th. ed., 223.
2. Lord Redesdale, **Cholmondeley v. Clinton** (1821) 4 Bli. 75, 117.

Outline of the Policy

It is trite law that on a sale of an unregistered freehold under an open contract, the vendor must (subject to contrary agreement) prove his title over a period of at least 15 years starting from a good root of title. [3]

> "He must do so by showing the links in the chain of title stretching between the root of title and himself ... these links are every document or event effecting or affecting a disposition or devolution of any legal or equitable estate or interest in the property sold during the period of title". [4]

However, Professor J.T. Farrand also points out in **Contract and Conveyance**[5] that the vendor is not (by virtue of the provisions summarised above) required to give anything like a complete history of the property's ownership; without that complete history, the account may not be of ownership at all, some third party being the true owner all the time.

But if this is possible, why, it might be asked, does the legislation only require (and why are purchasers generally content only to require) a vendor to prove his title over a minimum period of 15 years. The answer suggested in this thesis is that this is because it is thought to be reasonably safe to do so. And it is thought to be reasonably safe to do so because the Statute was designed to and does provide a kind of qualified guarantee that any possible outstanding claims to ownership by third parties are time-barred. It is suggested, therefore, that the Statute facilitates conveyancing by making it safe in practice to investigate an unregistered title only for a comparatively short period. This is what Lightwood (doyen

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3. L.P.A. 1925, s.44 as amended by L.P.A. 1969, s.23.
4. J.T. Farrand, Contract & Conveyance, 3rd. ed., (1980), 100.
5. 3rd. edition, p.92.

of writers on limitation) had in mind when he said[6] that the real guarantee of safety in unregistered conveyancing is the probability that any outstanding rights there may be will have been time-barred.

To the same effect, Pollock and Wright noted that:

> "With very few exceptions, there is only one way in which an apparant owner of English land who is minded to deal with it can show his right to do so; and that way is to show that he and those through whom he claims have possessed the land for a time sufficient to exclude any reasonable probability of a superior adverse claim"[7]

to which Megarry and Wade subscribe,[8]

> "it is by limitation that any such superior estate will have been excluded".

The way in which the period for proof of title under a contract for the sale of land is connected with the limitation period is discussed in Chapter 12. The precise nature of the guarantee of safety in conveyancing provided by the Statute is the general subject of Part III and the first chapter of Part IV of the thesis. The remainder of this chapter now considers the origins of the modern limitation policy of facilitating conveyancing.

Origins - the law before 1833

It was suggested in the opening paragraphs of this chapter that the legislative roots of the modern law of adverse possession and the limitation of actions to recover land lie in the Real Property Limitation Act 1833. That Act was the direct result of the work of the Real Property Commissioners,[9] who were extremely critical of the state of the existing law and, more important for the purposes of this thesis, of the consequences of

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6. Lightwood, Possession, 295.
7. Pollock & Wright, Possession, 94, 595.
8. Megarry & Wade, Real Property, 4th ed., 1010; see also Lawson, Introduction to the Law of Property, 1st. ed., p.39.
9. First Report, 1829.

that law. Those criticisms and consequences must now be considered. However, a full explanation of the alleged deficiencies and their unfortunate consequences requires an equally unfortunately lengthy introductory description of the remedies for the recovery of land and associated rules of law which existed before the enactment of the 1833 Act.

The law before 1833

1. The Variety of Remedies[10]

Before 1833, one of the most striking features of the law of limitation was the multiplicity of remedies available for the recovery of land. In this section the different remedies are briefly considered.

A. The real actions

(1) The writ of right

Blackstone described this real action as lying only for the recovery of lands in fee simple unjustly witheld from the proprietor.[11] The claimant had to allege seisin of the land **de jure**[12] in himself or some person under whom he claimed, and show a better title to the land than the defendant. It was considered a **droitural** or proprietary remedy to distinguish it from the other, possessory, real actions (writs of entry, assizes). The distinction, however, was one of degree rather than of kind.

The remedy was available concurrently with all other real actions. It could also be brought after the other remedies had been exhausted. But in the years before 1833 it seems to have been used only occasionally and only where other remedies were barred (e.g., after "a recovery on the merits in a possessory action",[13] or by the Statute of Limitations).

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10. See generally, Black, Com., Books II and III.
    Prest. Abst., 2nd, 1824, Vol. II, 279 et seq.
11. Bl. Com., Book III, 194.
12. On the meaning of which see Lightwood, Possession, 73 et. seq..
13. Bl. Com., III, 193.

The alternative remedies were otherwise more expeditious and convenient. In particular, the remedy:

> "was surrounded by much cumbersome procedure, and the pretexts which it offered for making essoins (excuses) and other dilatory pleas".[14]

It remained theoretically possible to try the action by battle until as late as 1819.[15]

Limitation: By 32 Hen.VIII., c.2., the demandant could not rely on a seisin more than 60 years old at the date of the writ.[16]

(2) The Possessory assizes

Novel disseisin was a real action in which the demandant sought to recover the seisin of the land. He was required to prove his own seisin and his unlawful disseisin by the present tenant. Such questions of fact were referred to a jury summoned by the Sherriff and the matter was disposed of summarily,[17] no essoins being permitted.

The assize seems to have fallen out of general use by the 16th century.[18]

Mort d'ancestor was applicable in those cases of ouster of freehold which were technically known as "abatement".

"Abatement" occurred where a person died seised of an inheritance and before the heir/devisee entered, a stranger without right entered and took possession.[19]

The points at issue in the action were the seisin of the ancestor and whether the demandant was the next heir. The action began to become obsolescent in the 14th century.[20]

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14. Holdsworth, H.E.L., iii, 8, 624.
15. 59 Geo.III, c.46.
16.
17. Lightwood, 86
18. Co. Rep. 8. pref. Sutherland, the Assize of Novel Disseisin, Oxford, 1973, Ch.V.
19. Bl. Com., III, 168.
20. Sutherland, cited above, 150.

Limitation: By 32 Hen. VIII, c.2, the period of limitation was fixed at 50 years in the case of actions grounded on seisin and dispossession of an ancestor, or 30 years where the demandant had himself been disseised.

(3) Writs of entry

In these actions the demandant averred that the tenant "hath not entry" but by a disseisin or other wrongful act or event. The tenant of the freehold (i.e. the possessor) was required either to deliver seisin or to show cause why he should not.[21]

By the Statute of Marlbridge (1267) restrictions on the forms of writs of entry were in effect abolished. After the Statute,[22] it became sufficient either to charge the tenant with the wrongful act or to allege that he entered after [the writ of entry in the post] or subsequent to the ouster or injury done by the original dispossessor, on the basis that:

> "if the original title was wrongful, all claims derived from thence must participate of the same wrong" [23]

A remedy to recover possession by writ of entry - there were a series adapted to the circumstances of particular cases - became almost universal for all claims of ouster of land.[24]

Limitation: By 32 Hen. VIII, c.2. where the action was granted on the seisin of an ancestor, the period was 50 years; in an action on the demandant's own seisin, it was 30 years.

(4) Formedons

The alienation by a tenant in tail was treated as working a **discontinuance** (see below) of the estate tail, so that the estate could only be restored by action - the issue, remaindermen or reversioners, on the death

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21. Bl. Com., III, 180.
22. Maitland, The Forms of Action, 42.
23. Bl. Com., III, 183.
24. Bl. Com., III, 182; exceptions, 183.

of the tenant in tail, had no right of entry. They recovered by a **formedon**, a proprietary action.

Limitation: By 21 Jac. I, c.16, the period of limitation on a formedon was fixed at 20 years. An extension was allowed in cases of disability.

(5) Right of entry

The right of entry has been said to be the primary right of a disseisee against someone who has taken possession without right.[25] But it might be denied altogether where there had been a discontinuance, or taken away by a descent cast.[26]

Discontinuance: a discontinuance took place when an alienation of the fee by feoffment with livery of siesin was made by a tenant in tail, or by a person seised in right of another - e.g. a husband in right of his wife.[27] After a discontinuance, the person entitled had no right of entry, but only a right of action.

Descent cast: a right of entry was taken away or "tolled" by descent, when, after a disseisin, anyone died siesed of the land and the land devolved on the heir by act of law.

The disseisee's right of entry was taken away and he could only recover possession by action.[28] [The Statute of Henry VIII, c.33, provided that actual disseisors must have had peaceable possession for 5 years before a descent cast would affect the right of entry].

Continual claim: However a right of entry might be preserved proof against a descent cast by the formality of a "continuous claim".[29]

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25. Bract. f.162.
26. Lightwood, 44.
27. Litt. 494; Bl. Com., III, Ch.10.
28. Co. Litt. 237, a.b.
29. Litt. 419; Bl. Com., III, Ch.10.

A continual claim could be made by making a formal entry on the land and declaring that possession was thereby taken. One entry was sufficient for all land in the same county in so far as it was held by the same hand - otherwise multiple entries were necessary. If the claimant was afraid to go on to the land, it was sufficient to approach as near as he dare and follow the same forms and solemnities. The claim had to be made continually - i.e. once in each year and a day.[30] The effect of a claim was to vest seisin or possession in the claimant.

Limitation: The Statute 21 Jac.I, c.16, provided that no entry should be made, unless within 20 years after the right accrued.

(6) Remitter

The threat which the possessory actions posed to bona fide purchasers was relieved to some extent by the doctrine of remitter, and by conveyancing devices (discussed below) which took advantage of it.

> "Remitter is ... where a man hath two titles to lands or tenements, viz., one a more ancient title, and another a more latter title; and if he came to the land by a latter title, yet the law will adjudge him in by force of the elder title, because the elder title is the more sure and worthy title".[31]

(7) Conclusions

In the first edition of the Commentaries (1766-9), Sir William Blackstone pointed out that the real actions, although not out of **force**, were certainly out of **use**[32]

> "there being, it must be owned, but a very few instances for more than a century past of prosecuting a real action for land by writ of **entry, assize, formedon,** writ of **right,** or otherwise".

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30. Litt. 419; Bl. Com., III, Ch.10.
31. Litt. 659; and see Bl. Com., III, 19, 190.
32. Bl. Com., III, 197.

However, whilst the real actions were "intricate, tedious and expensive",[33] the fact that the limitation period was generally longer than in ejectment gave some life to these ancient remedies. And although few real actions succeeded after the remedy of ejectment was barred,[34] nevertheless the possibility of an action disturbed the certainty of titles.[35]

B. Personal Actions - Ejectment

As is well known, ejectment was originally the remedy of a person who had been wrongfully deprived of a term of years. Later, by a fiction, the remedy was extended to those ousted of freehold land. Unlike the real actions, which were founded on seisin, ejectment was based on possession and turned on which party had the better right to possess.

Immediately before 1833, it was this action which was almost universally adopted for the recovery of lands. However, it was not appropriate whenever an entry (above) could not be made on the property concerned e.g. when the right of entry had been taken away by descent or a discontinuance.

Limitation was governed by the Statute of James (21 Jac. I., c.16) which provided a period of 20 years after accrual of the right of action. Extensions of time were allowed (sect. 2) in the cases of disability.

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33. Humphreys, Observations on Real Property, 123.
34. Real Property Commissioners, First Report, 42;
    Hayes, Conv., I. 24.
35. **Romilly v. James** (1815) 6 Taunt. 263; and see e.g. **Smith v. Coffin** (1795) 2 H.B., 444;
    Dowland v. Slade (1804) 5 East 272;
    Widdowson v. Harrington (1820) 1 Jac. & W. 533;
    Scott v. Kettlewell (1814) 19 Ves. 335;
    Searle v. Kidner, noted at 1 Jac. & W. 559;
    Davies v. Lowdnes (1838) 5 Bing. N.C. 161;
    Jayne v. Price 5 Taunt. 326.

2. The Old Statutes of Limitations

Under the Statute of James (21 Jac. I., c.16) time ran from the disseisin[36] of a freeholder or ouster of a fermor or from the taking of adverse possession.

(i) Disseisin and Adverse Possession

After the decision in the great case of **Taylor v. Horde,**[37] there was doubt about what was necessary to constitute disseisin.[38] It was supposed that seisin implied a feudal relation between lord and tenant and that disseisin was usurpation of that relationship:

> "how the disseisin was to be effected when the relation had become obsolete and the actual usurpation impossible, was a matter of great controversy ...[39]

However, it seems to have been accepted that disseisin for limitation purposes was not much more than an ouster of the freeholder. It might be done by actually and wrongfully ousting him, or, after entering in the freeholder's absence, by maintaining the possession against him.

The Statute was also said to run from the taking of an adverse possession, which was said to be a possession inconsistent with the title of the true owner.[40] Adverse possession and disseisin were not necessarily iden-

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36. Preston (Abst., II, 285) used "disseisin" to cover not only "disseisin property so termed", but also abatement, intrusion and discontinuance or deforcement. Blackstone used "deforcement" as the generic term.
37. (1757) 1 Burr. 60; cf.**Goodright v. Forrester,** (8 East 552) in which "it was distinctly admitted by the Court, though the point is not reported, that the doctrine of Lord Mansfield (in **Taylor v. Horde**) was not tenable"; Pres. Abst., II, 402 - Preston was counsel in **Goodright.**
38. The case "confound the principles of law and produced a system of error". Prest. Abst., II, 280.
39. Lightwood, Possession, 42.
40. **Cholmondeley v. Clinton** (1820) 2 Jac. & W. 164.

tical[41] - although a number of ways of reconciling the two had been suggested.[42]

Despite the doubts, for very many purposes it was immaterial which mode of expression was adopted; in both cases, a hostile intent - an intent to disseise or to oust or to claim in opposition to the owner - seems to have been required to make time run.[43] An entry under a defective conveyance,[44] however, or a void will, or by an heir when there was a devisee would also start the limitation period running.[45]

(ii) Rules Preventing Disseisin - The Doctrine of Non-Adverse Possession[46]

Before 1833 'adverse possession' bore a highly technical meaning.[47] There were a number of associated rules and presumptions which prevented the operation of the Statute.

a. Possession referable to a lawful title : possession was never considered adverse if the possessor had some lawful title or right.[48]

b. Possession by a younger brother (or other remote heir) was deemed to be possession by the heir.[49]

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41. **Doe v. Gregory** (1834) 2 A. & E. 14. Prest. Abst., II, 295, 334, 338; Lightwood, Possession, 160, 163.
42. See Prest. Abst., 334;
Blanshard, Limitation, 11;
2 Sm. L.C., 12th ed., 670.
Carson's Real Property Statutes, 2nd, 1910.
Lightwood, Possession, 160.
43. **Blunden v. Baugh** (1632) Cro. Car. 302.
Taylor v. Horde (1757) 1 Burr. 112;
Williams v. Thomas (1810) 12 East 141;
Jerritt v. Weare (1817) 3 Price 575.
44. 2 Rep. 55.
45. Prest. Abst., II, 252.
46. See generally, Lightwood, Poss., 161 et. seq..
47. There were a number of associated rules and presumptions which prevented the operation of the Statute.
48. **Doe v. Brightwen** [1809) 10 East 583.
49. Litt. 396; cf. Co. Lit. 242 a.

c. Possession by one co-owner was possession by all (but see (e) below).

d. Possession was not adverse if taken by permission.[50]

e. Possession by a tenant at will or sufferance was deemed to be possession by the lessor.[51] Another way in which this rule was framed was to say that a possession which began rightfully could not be considered as becoming wrongful, although in the case of possession by a mortgagor or cestui que trust, it was established that the possessor might renounce the lawful title and begin to hold adversely.[52] A similar rule was also established in the case of joint tenants,[53] although proof (or facts sufficient to raise a presumption) of an actual ouster seems generally to have been required[54] to show the change in the nature of the possession.

3. Fine and Nonclaim[55]

The system of fines operated, in respect of freeholds, as a speedy system of limitation. Originally a fine seems to have been the compromise of an actual suit. Later, however, "levying a fine" came to be a fictitious compromise which was used as a conveyance - hence the expression "a feoffment of record" - with a very short period of limitation.

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50. **Doe v. Wilkinson** (1824) 3 B. & C. 413;
Doe v. Clark (1828) 8 B. & C. 717;
Doe v. Grubb (1830) 10 B. & C. 816;
Doe v. Thompson (1836) 5 A. & E. 532.
51. e.g. **Smartle v. Williams** (1795) 1 Salk. 245;
Deene v. Deardon (1807) 8 East 248;
Doe v. Perkins (1814) 3 M. & S. 271;
Doe v. Hull (1822) 2 Dow. & Ry. cf. **Doe v. Gregory** (1834) 2 A. & E. 14;
Doe v. Prosser (1774) Cowp. 218;
Heath v. Pugh (1881) 6 Q.B.D. 659.
52. **Cholmondeley v. Clinton** (1817) 2 Mer. 360;
Hall v. Doe (1822) 5 B. & Ald. 690;
Doe v. Williams (1836) 5 A. & E. 291.
53. **Doe v. Prosser**, above
54. Prest. Abst., 291. But "actual ouster", Preston suggested, meant "any act which denies the title of the co-owner".
55. See generally, Bl. Com., II, Ch.2; 1 Prest. Conv., Ch.2; Watkins, Conv., Ch.XV; Megarry & Wade, p.87. Forms - Bl. Com. II., Appendix.

After the Statute of 32 Hen. VIII, c.24 a fine levied with proclamations by a freeholder, barred the claims of all persons not under a disability and who had present interests, unless they claimed within 5 years. Persons under disability were allowed 5 years after the disability was removed. Persons who did not have present rights were barred 5 years after the right of entry accrued, unless under disability, when time began to run on cesser of the disability.

However, the effect of a fine could be avoided by a rightful entry or by continual claim, provided, after 4 & 5 Anne, c.16, that an action was commenced within one year of the entry or claim.

4. Criticism of the Law Before 1833

The law of limitation of actions to recover land was oblique and uncertain before 1833. Perplexity and confusion was caused:

> "by the entire want of system in the various periods of limitation, and the incongruous variety of remedies allowed for the recovery of real property."[56]

(a) The period of limitation was variable. An heir claiming on the seisin of an ancestor was allowed 60 years ("the writ of right"). In other cases (possessory action on the seisin of an ancestor) the period was 50 years and in some cases (real actions based on own seisin) 30 years. The ordinary bar to rights of entry and consequently in ejectment was 20 years; but the period might be as short as 6 years where a fine with proclamations had been levied.

(b) The confusing variety of remedies added to the uncertainty. The real actions themselves, and the applicable limitation rules, were

> "topics of lamentable uncertainty, obscurity, expense and delay".[57]

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56. Real Property Commissioners, 1st Rep., 8.
57. Humphreys, Observations on Real Property, 124.

(c) Fines. Not only was the period (6 years) too short, but the governing events also took place in secret. It was a mere fiction that "a fine with proclamations" was an act of public notoriety.

(d) But if the limitation period could be shortened by the secret act of one party, it could also be lengthened by a similar act of the other party. A "continuous claim" could keep alive a right of entry.

(e) "Adverse Possession". It was difficult in practice to determine whether adverse possession had been established, and if so, when it commenced. The many rules associated with the "doctrine of non-adverse possession" also greatly impaired the healing tendency of the statute.

(f) Multiple rights of entry. An individual with several estates in the same land, had several bites at the cherry since he was entitled to a new period of limitation on the vesting in possession of each estate.

(g) Entails, which at that time were the principal mode of settling land, created doubts and insecurity. An estate tail in remainder or reversion might not fail into possession - and so need not be asserted - for many years. The Real Property Commissioners cited one instance known to them in which a claim was successfully made under an estate tail which had vested in possession immediately before the claim was made, although it had been created in the reign of Elizabeth I.

(h) Ecclesiastical bodies were not affected by limitation at all; the Crown (by virtue of 9 Geo. III, c.16) was limited to 60 years.

(i) The law was unprincipled. Disability postponed the running of time under 21 Jac.I, c.16 in ejectment; but 32 Hen.VIII, c.2 (real actions) contained no such savings.

There were no times bars in actions of dower, escheat or waste.

(j) In cases of intestecy, time did not run until the grant of administration,

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58. Real Property Commissioners, 1st Rep., 58.
59. Humphreys, Observations, 29.
60. 1st Rep., 46.

instead of the date of death.

(k) The Statutes generally barred remedies, not rights. If a time-barred owner somehow got into possession, his title revived.

Conclusions

In the light of these deficiencies, it seems clear that in some cases the Statutes did not sufficiently protect possession. In other instances, (e.g. fines) the protection was too great.

These deficiencies were fully appreciated at the beginning of the 19th century. The judgements, for example, of Grant M.R. in **Beckford v. Wade**[61] and of Plummer M.R. in **Cholmondeley v. Clinton**[62] demonstrate an awareness of the need to limit the exceptions to the Statute. But by this time, the problem was beyond judicial reform. In his influential "Observations on the Actual State of the English Laws of Real Property"[63] James Humphreys noted the problem and called for remedial legislation. The Real Property Commissioners themselves, after a thorough review, came to a similar conclusion.[64]

The deficiencies of the law, and its consequences, convinced the Commissioners of the need to reform. But it was the **consequences** of the existing defective law of limitation which convinced the Commissioners not only of the need for new legislation, but also of the form which that legislation should take.

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61. (1805) 17 Ves. 87.
62. (1820) 1 Jac. & W. 494.
63. London, (Murray), 1826; And see also Prest. Abst., 2nd, 1820, II, 333.
64. This section of the Commissioner's First Report, together with the introduction, was draft by the First Commissioner, Lord Campbell - Autobiography, London, (Murray), 1881, 485.

Consequences

It was not disputed that the law might work hardship to any litigant. Anyone tempted to "waken the sleeping dragons of the law"[65] and institute a real action, risked great expense and possible ruin;[66] owners, on the other hand, were put to vexation and expense in defending themselves in real actions against:

> "Schemes of unprincipled practitioners of the law, to defraud persons in a low condition of life of their substance, under pretence of recovering for them large estates, to which they had no colour of title".[66]

But dangerous though the law may have been for litigants, its effect on conveyancing practice was perhaps even more serious. For the law also exposed **all** owners to considerable vexation and expense whenever they attempted to alienate their property.[67]

Although an adverse claim could seldom be set up after 20 years adverse possession, the possibility:

> "renders all titles questionable to the extreme limit ever allowed".[68]

The result was that on sales and mortgages, it was necessary that every title should be strictly examined for nearly a century, and that evidence should be given of the enjoyment, transfer and devolution of the property during that long period.[69] This led to abstracts of great length and consequently to harrowing and expensive enquiries.

> "Many titles, notwithstanding long enjoyment, are found unmarketable; and if, after tedious delays, the transaction is completed, the law expenses inevitably incurred sometimes amount to no inconsiderable proportion of the values of the property".[70]

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65. Humphreys, Observations, 124.
66. R.P.C., I., 42.
67. Hayes, Conv., I., 224.
68. R.P.C., I., 41.
69. R.P.C., I., 41; Hayes, Conv., I., 234.
70. R.P.C., I., 8.

Nor were conveyancers necessarily satisfied merely by a lengthy investigation of title. To guard against the dangers of undiscovered transfers or charges (and relying on the doctrine of remitter, above)

> "Outstanding terms and other legal estates (that is, mere fictitious estates as far as regards possession, enjoyment and dominion) are carefully kept alive in the hope that an older legal estate may fortify the title of the purchaser".[71]

All these outstanding titles had of course to be abstracted and traced if the land was to be sold or charged. A purchaser could therefore be faced with the unattractive alternative of either incurring great difficulty and expense in investigating title, or take the considerable risk of waiving proof of "outstanding terms".

In the light of the undoubted emphasis which the first report of the Real Property Commissioners placed on the uncertainty and lack of principle of the old law and its consequences for owners who wished to deal with their land, it could not be clearer that the need to secure cheaper and quicker conveyancing was the principle concern of the Commissioners and was the springboard of the reform of the law of limitation by the 1833 Act, which resulted from their report.

In future, it was determined, the Statute would provide a guarantee of security of title. This would be achieved by making the law simple and consistent; there would only be one remedy and one limitation period which would have a uniform and certain effect.

The result would be to diminish litigation; but more important, it would save "vexation and expense" on alienation of land.[72] In a nutshell, shortening and making uniform the period of limitation would shorten abstracts and investigations of title by guaranteeing that outstanding claims were time barred.[73]

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71. R.P.C., I., 8.
72. R.P.C., I., 41.
73. See the argument of counsel in **Nepean v. Doe** (1839) 2 M. & W. 894.

The general policy outlined in the first report of the Real Property Commission was subsequently embodied in the Real Property Limitation Act 1833. It has held legislative sway ever since, being adopted and preserved by the Commissioners' successors in the 20th century.

However, although the Real Property Commissioners were fully conscious of the need for certainty, they were also well aware that certainty is not always consistent with fairness to the parties to a dispute before the court. Fairness for example, seems to demand that time should not be permitted to run unless the plaintiff knows, or at least ought to know, that the limitation period has commenced. It also points against protecting a trespasser who takes possession of land which he knows belongs to another, without a bona fide belief in his own right to do so. However, years after the event, it may not be possible to readily and unmistakeably determine the precise state of knowledge of either an owner or a squatter. The law of limitation of actions to recover land could insist on taking account of such factors only at the expense of certainty. So the Commissioners in fact recommended neither of these things.

But it is not suggested in this thesis that the Real Property Commissioners sought certainty above all things and at any price. For it is clear that whilst a policy of certainty was to be favoured in the interests of ownership generally, fairness and justice to individual litigants nevertheless had to be taken into account and special provision made for special circumstances. Thus, in certain circumstances periods longer than the usual 20 (now 12) years were provided. The ordinary period was extended in cases of disability. And the running of time was postponed in cases of fraud, concealment or mistake. The legislation since 1833 in fact represents a balance, drawn after consideration, between conflicting needs for certainty and fairness. It is with details of the way in which the Commissioners policy and that of their successors was worked out in the Statute,

and the nature and extent of the legislative guarantee of title thereby provided, that the subsequent sections of this thesis are concerned.

Reforms of 1833

Earlier in this chapter, a number of criticisms were made of the law as it stood before the Real Property Limitation Act 1833. In this short concluding section some of the more straightforward remedies adopted by 3 & 4 William IV, c.27 are briefly mentioned.

In pursuance of the Commission's object of simplicity and uniformity, the 1833 Act abolished almost all real and mixed actions for the recovery of land, leaving just one personal action - ejectment - as the sole remedy for the recovery of possession of land.[74] This reduction in the number of possible remedies also reduced the variety of period of limitation.

The Act then fixed 20 years as the normal limitation period for recovering land. At the same time, the Fines and Recoveries Act 1833 provided that no fine was to be levied after 1833, so that that system of limitation was ended.

A good deal of technical doctrine associated with rights of entry was also swept away. Descents and discontinuances no longer defeated rights of entry;[75] but on the other hand, a "mere entry" would no longer be deemed to vest possession and no right was to be preserved by continuous claim.[76] The result was that all dispossessed owners had rights of entry, but those rights had to be substantially exercised if possession was to be retaken.

A greater degree of principle was introduced into the law by, for example, making the cases of extension or postponement of the limitation period generally applicable and e.g. specifying limitation periods where

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74. Section 36; exceptions were made for dower and **quare impedit**, for which there was no equivalent personal action.
75. Section 39.
76. Section 11.

none had before existed, as in the case of ecclesiastical bodies. The Crown, however, was not barred by the 1833 Act.

Finally, a number of provisions were made with the aim of making the operation of the Act in relation to land as certain as possible. Some of these provisions - particularly those associated with the point from which time begins to run - are considered in more detail later on. But three particular provisions deserve mention at this point. First, the old problem of the owner with multiple rights of entry was dealt with. The Act provided simply that when an estate in possession was barred, the right of the same person to a future estate should also be barred, unless in the meantime possession of the land had been recovered by a person entitled to an intermediate estate.[78]

Second, an apparently harsh rule was adapted to deal with the serious risk posed by entails. Time was to run against the issue in tail and the remaindermen as soon as it began to run against the tenant in tail. Similarly, a defective dissentailing assurance was to be cured and bar remainders after 20 years possession.

Third, time was made to run against an administrator, not from grant, but from the date of death.

In the reforms mentioned in this section, many of the deficiencies of the old Statutes of Limitation were made good. The law became more straightforward and intelligible and complaints of obscurity and lack of principle were remedied. But the matters considered in the following chapters caused greater difficulty.

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77. Section 20.
78. Section 6.

PART III

THE RUNNING OF TIME - SCOPE

This part deals with the conditions required for the running of time. The first 3 chapters deal with general matters: the first (chapter 4) attempts to explain why the date of accrual of cause of action is the normal "terminus a quo" for claims to recover land. The second chapter in the section (Chapter 5) considers the meaning of "adverse possession" which is a general pre-condition for the operation of the Statute. The third Chapter (Chapter 6) deals with a spurious general maxim of the law of limitations - viz that "possession is never adverse if it can be referred to a lawful title". The remaining chapters in this part deal with the application of the Act to particular cases. Chapter 7 considers the accrual of causes of action in the case of present interests in land. Chapters 8 to 10 deal, respectively, with leases, trusts and mortgages.

CHAPTER 4

TERMINUS A QUO

In their 21st and final report on the limitations of actions, the Law Reform Committee, in considering the possible points from which time might be made to run, suggested that:

> The ideal terminus a quo would be an event which satisfied three conditions -
>
> a) it would be sufficiently near in time to the incidents giving rise to the claim to ensure that proceedings were instituted before the relevant evidence became either unobtainable or too stale to be reliable;
> b) it would be unmistakeable and readily ascertainable;
> c) its occurrence would necessarily become known forthwith to the plaintiff.[1]

However, as the Committee's report goes on to point out, it is obvious in practice that no terminus can satisfy all these conditions in every case.

An event, e.g. the taking of adverse possession, which will generally satisfy condition (b), may even so not always come to the immediate notice of the plaintiff and will not therefore always satisfy condition (c). It is therefore necessary to decide which condition shall prevail in the event of a conflict. To enable the conditions to be listed in order of priority, a policy decision has to be made about the functions of the law of limitations of claims to recover land. It has been suggested in this thesis that the need to provide a guarantee of security of title is an important strand in the policy of the law in this area. Such a policy means that condition (b) in the Law Reform Committee's list is an essential element in the law and must be given priority where it conflicts with the other conditions. For the Statute can only be seen as a guarantee of security of title (which

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1. H.M.S.O., 1977, Cmnd. 6923. para. 2:1.

will facilitate conveyancing) if it operates with certainty and by reference to facts which are unmistakeable and readily ascertainable.

It is submitted that condition (b) is in fact given due priority and is an ideal towards which the legislation strives. This can be seen by examining the different events which might be fixed as the **terminus a quo** for claims to recover land.

There are three possible ways of fixing the **terminus a quo.** The alternatives are:

(i) to make time run from the date on which the plaintiff discovered, or could have discovered, the relevant facts;[2] or

(ii) to confer on the Court a discretion to override a "normal" fixed period of limitation in hard cases;[3] or

(iii) to fix the date of accrual of a cause of action as the general **terminus a quo.**[4]

The first, the "date of knowledge" principle, may certainly be fair in that it may prevent a diligent plaintiff from suffering hardship. This alternative would give primacy to condition (c) above. But it involves much uncertainty.[5] And cases in which the plaintiff is totally unaware of his claim are comparatively rare.[6] This approach has therefore been consistently rejected by both committee and judiciary:

> "it is clear that the "date of knowledge" could never form an appropriate **terminus a quo** for claims involving title to property....where certainty is of paramount importance.[7]

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2. L.R.C., 21st Rep., para. 2:26.
3. Law Revision Committee, H.M.S.O., 1936, Cmnd. 5334, p.10; L.R.C., 21st Rep., para. 2:21, 2:30.
4. L.R.C., 21st Rep., para. 2.35, 2.36.
5. L.R.C. 21st Rep., para. 2.4, 2.32, 2.34.
6. Law Revision Committee, 1936 Report, p.12.
7. L.R.C., 21st Rep., para. 2.4; 1936 Report, p.12.

There are also many judicial statements denying that the plaintiff needs to know that the Statute is operating against him before time will run:

> no plea of...ignorance.. can be of any avail." [8]

For similar reasons, any demerits of the party relying on the Statute are also to be ignored [9], except to the limited extent to which the Statute expressly makes that person's conduct relevant. [10]

The second alternative approach - "judicial discretion" - would enable cases to be dealt with on their own particular merits and would avoid the hard cases which are bound to occur under any rigid system.[11] But this approach involves at least as much[12] uncertainty as the date of knowledge principle. It is therefore also inappropriate for claims to recover land and has never found favour with either reform committee or Parliament, for land claims. [13]

The final possibility is to make time run from the date of accrual of a cause of action. This is clearly the line which enables the Statute to operate with the greatest certainty, in the sense that it gives an independent observer (i.e. a purchaser), years after the events have taken place, the greatest chance of being able to see whether time has run.

For this approach does not require the ousted owner's state of knowledge to be investigated, nor does it require an independent observer to try to guess how a judge would exercise a discretionary power. Accordingly this has in fact been the approach preferred since 1833.

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8. **Cholmondeley v. Clinton** (1820) 2 Jac. & W. 139; **Dawkins v. Lord Penrhyn** (1874) 4 App. Cas. 51; **Rains v. Buxton** (1880) 14 Ch.D. 537; **Craven v. Pridmore** (1901) 17 T.L.R. 399; **Cartledge v. Jopling** [1963] A.C. 758.
9. **Vane v. Vane** (1873) L.R. 8 Ch. 383; **Cholmondeley v. Clinton** above.
10. That is, in case of fraud and concealment, discussed below.
11. 1936 Rep., p.11.
12. 1936 Rep., p.11.
13. The L.A. 1975 introduced such a rule in personal injury and death cases.

In 1829 the Real Property Commissioners, it will be recalled (Chapter 3, above), recommended the abandonment of the old notion that time ran from the taking of "adverse possession". [14] Consequently, by the R.P.L.A. 1833 Parliament substituted the rule that time ran from the accrual of cause of action. This approach has held legislative sway ever since. Neither the Law Revision Committee in their 1936 Report, nor the Law Reform Committee in 1977 either questioned or dissented from this philosophy, which is now embodied in the consolidating Limitation Act 1980.

The legislation in fact goes even further in an attempt to provide certainty. It not only adopts the general principle that time runs from the date on which a cause of action accrues, but (uniquely in the case of actions to recover land) it goes on to fix the date on which the right of action shall be treated as having accrued. [15] There has been slight disagreement over the purpose of these "deemed accrual" provisions of the Act, which were outlined briefly in the introduction above and which are considered in detail later in this part. It has occasionally in the past been suggested that the provisions are merely "declaratory", [16] as if they did nothing more than express the position at common law. It is true that in most cases, the events specified in part 1 of Schedule 1 of the 1980 Act would in any event give rise to a real cause of action. In the case of present interests, for example, a "dispossession" (sch. 1, para. 1) would no doubt in any event give rise to a right of action at law.

In this instance, the "deemed accrual" provision is declaratory. But other of the "deemed accrual" provisions go further and also resolve points

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14. Report, p.77.
15. Where the Act is silent on date of accrual, regard must be had to general principles.
16. Hayes, Conv., 4th, p.352.

of legal doubt or difficulty[17] and so avoid uncertainty in the law. In two particular instances, the Statute also goes well beyond either mere declaration or the resolution of doubtful points of law. The two instances are (i) non-payment of rent under a periodic tenancy without a lease in writing and (ii) wrongful receipt of rent of at least £10.00 a year, from one who possesses under a written lease. In these two cases the Statute provides that, for limitation purposes, a cause of action to recover the land shall be deemed to accrue (so that time runs), even though no such cause of action would otherwise necessarily have existed. It will be suggested, when the rules in question are considered in more detail, (below), that an explanation for both these special provisions is the desire to enhance the operation of the Statute as a guarantee of security of title.

Summary

The Statute, consistent with the policy of providing a legislative guarantee of title, selects the date of accrual of cause of action as the point from which time runs. The Court does not have a general discretion to select any other date. Knowledge on the part of the "true owner" of the existence of his right of action is not required.

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17. **James v. Salter** (1837) 3 Bing. (N.C.) 544, approved in **Irish Land Com. v. Grant** (1884) 10 App. Cas. 14; **Magdalen Hospital v. Knotts** (1878) 8 Ch.D. 709; **Pugh v. Heath** (1881) 6 Q.B.D. 345, (1882) 7 App. Cas. 235; **Devon's Settled Estates** [1896] 2 Ch. 562; **Alberta, Institute of Law Research and Reform**, University of Alberta, Working Paper 77, Limitation of Actions, 29.

CHAPTER 5

ADVERSE POSSESSION

Introduction

It was explained in Chapter 1 (above) that the general principle on which the Statute works is that no proceedings may be brought after the lapse of a prescribed period from the accrual, or deemed accrual, of a cause of action. [1] The legislation contains a detailed set of provisions which fix the date on which a cause of action to recover land is to be treated as accruing;[2] however, those provisions are not exhaustive and regard must sometimes be had to general principles to ascertain the date on which a cause of action accrued.[3] Even so, the accrual, or deemed accrual, of a cause of action to recover land is not enough to start time running. It is also necessary that someone should be in adverse possession of the land. As Preston and Newsom explain, it has always been the law that time does not run against an owner unless the land is in the "adverse possession" of another, but the expression "adverse possession" has borne various meanings.

In this chapter the requirement of "adverse possession" and the meaning of that phrase are considered. This is not a simple task. The reason for and the meaning of "adverse possession" have long been a matter of dispute and doubt. The difficulties are, in part, created by the frame of the Act. They have also, in part, been created by judicial decisions. But in this thesis it is necessary to attempt to resolve the difficulties for two reasons. First, because doubts about the need for and the meaning

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1. Preston and Newsom, 4; Lightwood, Time Limits, 8.
2. Preston and Newsom, 86; Lightwood, Time Limits, 15.
3. Preston and Newsom, 95; Lightwood, Time Limits, 15.

of "adverse possession" tend to obscure the objectives of the Statute. And it is the aim of this thesis to clarify those objectives. Second, because this thesis also attempts to estimate the extent to which the law is framed so as to achieve its objectives. So here again, an attempt must be made to examine the doubtful points.

The problem is best approached by examining the way in which the meaning of "adverse possession" has changed in the recent past.

"Adverse Possession" before 1833

It was pointed out in chapter 3 (above) that under the old Statutes of Limitation, time ran from the taking of an adverse possession, but that the rules associated with the doctrine of "non-adverse possession" made the law uncertain and difficult to apply. The Real Property Limitation Act 1833 reformed that doctrine. However, in order to judge the effect of the 1833 Act on the doctrine of non-adverse possession, it is necessary to refer to a number of provisions, for the draftsman did not deal with that doctrine by abolishing it with one stroke.

Indeed, he could not have done so, for the phrase "the doctrine of non-adverse possession" did not describe a single doctrine but covered a body of loosely associated rules or presumptions which artificially prevented the running of time. The draftsman therefore used different techniques to deal with different aspects of the doctrine. First, the scheme adopted by the Act (section 2) barred actions after lapse of time calculated from the accrual of a cause of action, unlike the old law which had made time run from "adverse possession". Then in two instances, particular rules of "non-adverse possession" were specifically reversed.

1) The rule that possession of a younger brother (or other remote heir) was deemed to be the possession of the heir was abolished by section 13 of the R.P.L.A. 1833.

2) Section 12 of the Act provided that possession of one of several co-owners was no longer to be deemed the possession of the other(s).

But while the Act dealt expressly with only these two rules of "non-adverse possession", it also dealt by implication with the others.

3) Sections 3,7 and 8 of the Act contained provisions fixing the date on which a course of action was to be deemed to accrue to a landlord in the case of a tenancy for years, or from year to year, or at will. By implication, these provisions, when taken with section 2, excluded the doctrine of non-adverse possession in the case of tenants "holding over" after an actual or deemed determination of a tenancy.

4) Finally, section 15 of the Act transitionally provided that where possession was not adverse at the passing of the Act, the right of action should nevertheless not be barred even though the 20 year limitation period had already expired until a further five years from the passing of the Act had expired.

The implication of the section was that "adverse possession" in the old sense was no longer required.

"From the language of the fifteenth section it plainly appears that something or other was after the Act passed, to be considered as adverse possession, which was not so before the Act passed. For in that section it seemed to be considered that the possession, which up to the passing of the Act, was not adverse as the law then stood, would, by the operation of the Act, become so on the very day after the Act passed; and that by relation; otherwise the provision as to the five years was not needed to protect the right of the party against whom such adverse possession might be set up".[4]

In the result, it is fairly clear that the intention of the draftsman was to abolish such of the old rules of "non-adverse possession" as artifically prevented the running of time. And soon after the 1833 Act was passed, it was held to have had this effect.

In **Nepean v. Doe**[5] for example, Lord Denman C.J., remarked that:

"We are all clearly of the opinion that the second and third sections of that Act... have done away with the doctrine of non-adverse possession, and except in cases falling within the 15th section...the question is whether 20 years have elapsed since the right accrued, whatever be the nature of the possession".[6]

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4. **Doe v. Williams** (1836) 5A.& E. 291, per Patterson J.
5. (1837) 2 M. & W. 894.
6. Of course if no right of action has accrued, the fact of long possession by itself (e.g. by an agent, a servant, guest or licensee) is irrelevant.

Similarly, in **Culley v. Taylerson,** Lord Denman again made his views plain:

> "The effect of this section (section 2) is to put an end to all questions and discussions whether the possession of lands, etc., be adverse or not." [7]

"Adverse Possession" between 1833 and 1940

But while the effect of the 1833 Act was to abolish the old doctrine of "adverse possession", that phrase nevertheless continued to be used, although with quite a different meaning. After 1833, "adverse possession" was used by writers, practitioners and judges. But it was then used, not in a technical sense, but merely as a convenient term for possession in favour of which time was running;[8] that is to say, as a convenient shorthand term for the possession of a person against whom the owner had, or was deemed to have, an accrued right of action.[9]

In general, where a possession was inconsistent or incompatible with the title of the owner, a cause of action to recover possession would have accrued to the owner and the possession could be said to be adverse.[10] But as explained above, the 1833 Act and all its successors, contain "deeming" provisions which fix the date on which a cause of action might be treated as accruing in prescribed circumstances. In some of these cases, the person in possession may have a title or a possession which is in fact compatible with that of the true owner, e.g. a tenant at will - nevertheless time did run in favour of such a possessor. Such a possessor could therefore be said to have been in "adverse possession" for the purposes of the Act because a cause of action was to be treated as existing against him.

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7. (1840) 11 A & E. 1015. See also **Doe v. Bramston** (1835) 3 A & E. 63; **Doe v. Williams** (1836) 5 A & E. 291; **exp. Hassell** (1839) 3 Y. & C. 671; **Doe v. Eyre** (1851) 17 A & E. (N.S.) 366; **Ely v. Bliss** (1852) 2 De G.M. & G. 459; **Smith v. Lloyd** (1854) 9 Exch. 562; **Magdallen v. Knotts** (1878) 8 Ch.D. 709; **Paradise v. Price-Robinson** [1968] A.C. 1072; **Hughes v. Griffin** [1969] 1 W.L.R. 23.
8. **Ely v. Bliss** (1852) 2 De G.M. & G. 459; **Hughes v. Griffin** [1969] 1 W.L.R. 23, noted F.R. Crane (1969) 33 Conv. (N.S.) 211.
9. Preston and Newsom, 87.
10. **Des Barres v. Shey** (1873) 29 L.T. 592 P.C.; **Murland v. Despard; Powell v. McFarlane** (1979) 38 P. & C.R. 452.

As Lightwood explained:

"A possession held under title may be adverse"[11]

To summarize, between 1833 and 1940, the practitioners term "adverse possession" included -

(a) wrongful possession, including those cases which pre-1833 were wrongful but non-adverse; and

(b) certain types of lawful possession - e.g. that of a tenant at will, a periodic tenant or a mortgagee; and

(c) certain events which were not possession at all - e.g. wrongful receipt of rent.

"Adverse Possession" after 1939

In the Limitation Act 1939, for the first time, reference was made to "adverse possession" and that term was defined (section 10, now LA. 1980, sched. 1, para. 8).

The current provision is:

> "8 --(1) No right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run (referred to below in this paragraph as "adverse possession"); and where under the preceding provisions of this schedule any such right of action is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing unless and until adverse possession is taken of the land".

In order to explain the meaning of this provision, it is necessary to have regard to pre-1939 law.

Origins of the modern rule of adverse possession

It was noted above that the scheme of the modern legislation is to provide that no action shall be brought more than a certain number of

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11. Time Limits, 8; Preston and Newsom, 87.

years after the accrual of a cause of action, and that the legislation, in certain instances, fixes the date on which a cause of action is to be deemed to accrue and from which time will run. When this scheme was first adopted in 1833, it gave rise to two problems.

First, in some of the "deemed accrual of cause of action" provisions, the circumstances prescribed did not include any reference to possession of the land by someone other than the owner. It therefore appeared that in some cases, time might run and a title be extinguished, even though there had never been anyone against whom an action could have been brought. For example, in the case of present interests in land, it was provided in 1833 (now 1980 Act, sched 1, para. 1) that time should run from a "discontinuance of possession". Read literally, "discontinuance" might have seemed to suggest that time began to run once the owner withdrew from possession, notwithstanding that no one else had entered. This was manifestly inconvenient.

In Ireland, a rather forced construction was therefore placed on "discontinuance" which was held to require not only abandonment of possession, but also the taking of possession by a third party.

> "The word "discontinuance" I understand to mean an abandonment of possession by one person, followed by the actual possession of another person. This I think must be its meaning; for if no one succeeded to the possession vacated or abandoned, there could be no one in whose favour or for those protection the Act could operate. To constitute discontinuance there must be both dereliction by the person who has the right and adverse possession (in the post 1833 sense) to be protected". [12]

This view was adopted in England shortly afterwards in **Smith v. Lloyd:** [13]

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12. Blackburne C.J., **McDonnell v. M'Kinty** (1847) Ir. L.R. 10. 526, - italics supplied.
13. (1854) 9 Ex. 562, Parke, B. italics supplied; see also **Rains v. Buxton** (1880) 14 Ch.D. 537, 539.

> "We are clearly of the opinion that Statute (R.P.L.A. 1833) applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out of and another in possession for the prescribed time. There must be both absence of possession by the person who has the right and actual possession by another, whether adverse (in pre 1833 sense) or not, to be protected, to bring the case within the Statute. We entirely concur in the judgement of Blackburne C.J. in **McDonnell v. McKinty** and the principles upon which it is founded."

These cases were cited with approval in the later case in the Privy Council of **Trustees, Agency Co., v. Short.**[14]

By this process of liberal construction, the Courts supplied a remedy to the problem of "discontinuance". But similar problems were also raised by the other "deemed accrual" provisions which are now contained in the L.A. 1980, schedule 1, e.g.

(a) para. 2 - failure to take possession under a will or intestacy. Cause of action accrues on death of last person entitled in possession.

(b) para. 3 - failure to take possession under an assurance. Right of action treated as accruing on the date when assurance took effect.

(c) para. 4 - reversions/remainders. A right of action in respect of a future estate accrues when it falls into possession.

(d) para. 6 - forfeiture/breach of condition. Right of action accrues on date when forfeiture incurred or condition broken.

None of these provisions appear at first sight[15] to require anyone to be in possession of the land at the relevant date, although no doubt someone will be in possession in most cases.

The second problem posed by the scheme of the 1833 Act was that since a cause of action was to be barred a certain number of years after the date on which it accrued, it might happen that an intruder would abandon possession after a cause of action had accrued, and the owner might be barred even though no one had been in possession for the remainder of the statutory period. It could quite conceivably have been held that

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14. (1883) 13 App. Cas. 793.
15. See Hayes, Conv., 5th, (1840), I, 248, as to example (a).

once time begins to run, it runs continuously unless and until the owner re-enters and takes possession again.[16] This again would have been manifestly inconvenient. So in the leading case of **Trustees, Agency v. Short** [17] it was held that where a squatter goes out of possession, time ceases to run.

After this, **Smith v. Lloyd** and **Trustees, Agency v Short** came to be regarded as having established a general principle that if time was to run not only must a cause of action have accrued or be deemed by the Act to have accrued, but there must also be someone in possession at the start of and throughout the statutory period.

> There must be both absence of possession by the person who has the right, and actual possession by another... to be protected, to bringing the case within the Statute" [18]

The meaning of the modern rule

Section 10 (1) and (2), of the 1939 Act (now L.A. 1980, sched. 1, para. 8) was merely intended to put that general rule into statutory form.[19] The effect of the enactment is that a right of action only accrues, and time only runs, if and so long as there is someone in possession.

The words in L.A. 1980 paragraph 8 (1) "in whose favour the period of limitation can run" mean no more than that the person in possession must not be disqualified from relying on the Statute, as are trustees[20] and beneficiaries who are not absolutely entitled.[21]

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16. Lightwood, Possession, 267.
17. Compare **Willis v. Howe** [1893] 2 Ch. 545.
18. **Trustees, Agency Co., v. Short**, above, per Lord Macnaghten, citing Parke, B., **Smith v. Lloyd**, above, and see **Johnson v. Brock** [1907] 2 Ch. 533, 538.
19. Preston and Newson, preface to 1st ed., (1940); 3rd ed., 88.
20. L.A. 1980, s.21 (1).
21. L.A. 1980, Sched. 1, para.9.

But the simplicity of this meaning of the statutory phrase "adverse possession" does not seem to have been attractive to the Court. On the contrary, it seems that in the last 40 years no less than 5 other meanings have been suggested. It has been said that "adverse possession" might mean:

a) the possession of someone against whom the owner has, or is deemed to have, an accrued right of action to recover the land; or

b) an independent possession, in the sense of one which is inconsistent or incompatible with the title of the true owner;

c) a hostile possession - a possession with a hostile intention; possession with the intention of excluding the true owner;

d) a possession which inconveniences the true owner; or

e) a possession "without a shadow of a right".

It will be seen that versions (a) and (b) represent attempts to read into the statutory provision, the meaning which "adverse possession" bore between 1833 and 1940; in versions (c) and (d) attempts have been made to read into "adverse possession" the rules laid down in the old cases or **Littledale v. Liverpool College**[22] (version c) and **Leigh v. Jack**[23] (version d). [Those cases are discussed in detail below]. Version (e) is a recent and spurious invention of the Court of Appeal.

It is necessary to examine each version separately:

(A) Adverse possession means the possession of someone against whom the owner has, or is deemed to have, an accrued right of action.

It was first suggested that statutory adverse possession bore this meaning in the case of **Moses v. Lovegrove.**[24] In that case the defendant, a

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22. [1900] 1 Ch. 19.
23. [1879] 5 Ex. D. 264.
24. [1952] 2 Q.B. 533. Another way in which this first suggested meaning of "adverse possession" might be formulated, is by asking whether the defendant would have a good defence to any action for possession; **Hyde v. Pearce** [1982] 1 All E.R. 1029, criticised, (1983) 46 M.L.R. 89 (M.S.D.).

tenant under an oral weekly tenancy, ceased to pay rent in 1938. Thereafter, the tenancy was deemed by the 1939 Act to have determined and a right of action to recover possession was deemed to have accrued, so that time began to run one week after the last payment of rent. A little over a year later, the premises were brought within the provisions of the Rent (Restrictions) Act 1939. In 1952 the landlord sought to recover possession.

It was admitted by the plaintiff that until the Rent Restrictions Acts began to apply to the tenancy, the defendant was in adverse possession. However, it was argued that when the premises were brought within the scope of those Acts, the defendants ceased to be in "adverse possession", because the plaintiff no longer had an absolute right to recover possession. It was said that the most he had was a right to invite the Court to exercise a discretionary power.[25]

In the Court of Appeal, Romer L.J. agreed that one of the ways in which the existence of adverse possession could sometimes be tested (though he though the test was not exhaustive) was by asking if the owner had a right to sue for possession. But an actual right of action was not invariably required - it was quite sufficient if the plaintiff had a deemed right of action (as the plaintiff had initially) to recover possession. In this case, one meaning which Romer L.J. was therefore prepared to give "adverse possession" in the Act was its pre-1940 meaning of, "the possession of someone against whom the owner had, or was deemed to have, a right of action".

There is subsequent judicial support for this approach. In **Tecbild v. Chamberlain**[26] for example, Sachs L.J. thought that on the particular

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25. But, **query**, whether he even had this right whilst the tenancy remained on foot, as it did for all purposes other than those of the Limitation Act 1939.
26. [1969] 20 P. + C.R. 633.

facts of the case, in which a cause of action was deemed to accrue on a dispossession (1980 Act, sch. 1. para. 1.) dispossession would also amount to "adverse possession":

> "In this particular case, there seems to me to be no difference between adverse possession and dispossession, though there may be in other cases".

Sir John Pennycuick in **Treloar v. Nute**[27] took a similar line and equated "dispossession" (L.A. 1980, sched. 1., para. 1.) with "adverse possession" (sched. 1. para. 8.), as did Slade J. in **Powell v. Macfarlane:**[28]

> "I would regard a person who has dispossed another....as being in "adverse possession" for the purposes of the Act".

This approach, however, which attributes to "adverse possession" its pre-1940 meaning, of the possession of someone against whom the owner has a right to action, inevitably leads to circularity.[29] In effect, on this view sched. 1. paragraph 8 reads:

> "No right of action to recover land shall be treated as accruing unless the land is in the possession of some person **against whom a right of action to recover the land has accrued or is to be treated as having accrued**".

This construction, of course, adds nothing to Act. This version of "adverse possession" might therefore be abandoned or rejected without loss.

(B) "Adverse Possession" means a possession which is independent, in the sense of being inconsistent or incompatible with the owner's title[30]

This second version of the meaning of statutory adverse possession has been adopted by a number of judges, although the idea is not always

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27. [1977] 1 All E.R. 230.
28. [1979] 38P. & C.R. 452, 469, although at the time both cases were decided an exception had to be recognised for the rule in **Wallis's v. Shell-Mex** (below), since repealed.
29. Franks, Limitations, 199.
30. Franks, Limitations, 119; Megarry and Wade, 1013; Cheshire, Real Property, 887; Clerk and Lindsell, Torts, 14th ed.

expressed in exactly the same way.

In **Moses v. Lovegrove**[31] for example, Lord Evershed M.R. said that:

> "according to the ordinary sense of it, adverse possession must be... possession inconsistent and in denial of the right of the landlord to to the premises".

Romer L.J., in the same case put the matter a little differently, saying it was legitimate to look at the nature of the possession of the occupant. Adverse possession would then exist if the occupier's right of occupation was not derived from the owner in the form of "permission or agreement or grant".

However, Romer L.J.'s test was not intended to be applied literally. For there may be adverse possession in some cases where the possession is in fact held under title.[32] Where a right of action is only deemed by the Act to accrue to the owner (e.g. as in **Moses v. Lovegrove**) the defendant may well have a right of possession which is derived from the owner in the form of permission or agreement or grant. But in **Moses**

> "nevertheless for the purpose of the Act....his tenancy ceased to exist and therefore he is deemed to have remained in adverse possession".

This view was endorsed by a majority of the Court of Appeal in **Hayward v. Chaloner**[33] where it was said that:

> "The principle clearly accepted was that once the period covered by the last payment of rent expired, the tenant ceased to be regarded by the Limitation Act as the tenant"

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31. (1952) 2 Q.B. 538; **Murphy v. Murphy** [1980] I.R. 183.
32. Lightwood, Time Limits, 8.
33. [1968] 1 Q.B. 107 at 122, Russell L.J. Cf. **Hughes v. Griffin** [1969] 1 W.L.R. 23, which can be explained on the ground that no cause of action at all had accrued.

He then had an independent possession and became an adverse possessor.

Finally, in **Palfrey v. Palfrey**[34] where a tenant ceased to pay rent and continued in possession under an oral promise that the land was hers, it was held that whether a cause of action accrued because the Act so provided on a tenant ceasing to pay rent, or whether a right of action accrued on general principles, the result was the same: adverse possession began from that time.

Accordingly, it appears that the Court has accepted that whenever a right of action accrues or is deemed to accrue, then the possession will no longer be regarded as derivative; if it is not derivative, it can be regarded as adverse. It seems, therefore, that on this view the requirement of "independent title" adds nothing to the other provisions of the Act which require possession and the accrual, or deemed accrual, of a right of action before time can run. And if this second version of "adverse possession" is correctly understood, then it is conterminous with the first version discussed above, i.e., if the possession is independent, a cause of action to recover it will have accrued; if the possession is derivative no cause of action will have accrued; so both these tests of the existence of adverse possession will produce the same circular, answer. Both tests lead to circular arguments between adverse possession and the accrual of a right of action, neither of which can exist without the other.[35] No doubt it is for this reason that further efforts have been made to find a more satisfactory meaning for "adverse possession" in the Statute. Hence:

(C) Adverse possession means hostile possession: possession with a hostile intent

In **Littledale v. Liverpool College,** Lord Lindley M.R. said that possess-

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34. Unrep., C.A., 5.12. 1973, Bar Lib. No. 461A, Lord Denning M.R. **Bridges v. Mees** [1957] Ch. 475.
35. Franks, Limitations, 119.

ion involves an "animus possidendi - i.e. occupation with the intention of excluding the owner as well as other people".[36]

The **Littledale** case is considered in detail below. At this point, however, it should be said that it has been suggested (see e.g. counsel's argument in **Wimpey v. Sohn**[37]) that the **Littledale** rule has now been embodied in the Statute by the introduction of the statutory requirement of adverse possession. The precise point was not however dealt with by the Court of Appeal in that case.

But in the later case of **Palfrey v. Palfrey**[38] Cairns L.J. unequivocally stated that:

> Adverse possession does not necessarily involve any element of hostility".

Accordingly, while the Littledale rule may possibly be good law, it is certainly not because it is embodied in the statutory requirement of adverse possession.

(D) Adverse possession means a possession which inconveniences the true owner.

This version of the meaning of adverse possession is perhaps the most tortuous.

In the leading case of **Leigh v. Jack**[39](discussed below) Bramwell L.J. appears to lay down a rule that to dispossess an owner, an intruder's acts "must be inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it".

For present purposes, the important point is that since 1939, it has occasionally been suggested[40] that the rule in **Leigh v. Jack** is the origin

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36. (1900) 1 Ch. 19, 23.
37. **Wimpey v. Sohn** [1967] Ch.487; cf. argument of counsel in **Williams Bros. v. Raftery** [1958] 1 Q.B. 159.
38. Cited above. and see **Briges v. Mees** cited above. But cf. **Murphy v. Murphy** [1980] I.R. 183.
39. (1879) 5 Ex. D. 264.
40. For example, argument of counsel in **Hayward v. Chaloner** above, **Wimpey v. Sohn** above, **Williams Bros. v. Raftery** above.

of the statutory requirement of adverse possession.

In **Hayward v. Chaloner** for example, counsel argued that:

> "Section 10 (adverse possession, now 1980 Act, sched. 1. para. 8.) was a new Section in the Act of 1939 and therefore one may presume that the words adverse possession had the meaning given to them by Bramwell L.J. in **Leigh v. Jack**" [41]

Counsel added that "adverse possession" required that the squatter's use of the premises be inconsistent with the use intended by the landlord. These arguments were rejected by the Court of Appeal as having no bearing on a question arising under section 9 (2) of the 1939 Act (tenant ceasing to pay rent - now 1980 Act, sched. 1. para. 5). This left open the illogical question of the meaning of "adverse possession" (which is a general requirement) where section 9 (3) was not involved.

However, that doubt was finally resolved in **Treloar v. Nute**, on an appeal from the Penzance County Court, when a similar argument was more forcefully and more generally disposed of by Sir John Pennycuick:

> "The Judge found, as we read his judgement, that the defendant's father took possession of the disputed land outside the limitation period but that this possession was not adverse by reason that it caused no inconvenience to the plaintiff. In our judgement the second part of this findikng is contrary to the plain terms of section 10, which in effect defines adverse possession as possession of some person in whose favour the period of limitation can run. **It is not permissible to import into this definition a requirement that the owner must be inconvenienced or otherwise affected by that possession**" [42]

It is true that in **Treloar v. Nute**, an exception was nevertheless recognised for the decision in **Wallis's v. Shell-Mex.** As will be explained when this case is considered in detail, (below), Lord Denning M.R. there found that where a squatter occupies a vacant land which the owner needs to

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41. [1968] 1 Q.B. 107, 114, but Bramwell L.J. referred not to "adverse possession" but to "dispossession".
42. [1977] 1 All E.R. 230, 236.

use for a particular purpose in the future, but for which he has no immediate use (so that he is not inconvenienced or prejudiced by the squatter), the squatter's occupation will be treated as being by virtue of licence or permission of the owner. Since the possession is by licence, it is not adverse. Indirectly, therefore, adverse possession was made in **Wallis** to carry with it the requirement of inconvenience to the owner. However, as will also be explained below, the rule in **Wallis** was abolished by the Limitation Amendment Act 1980 (consolidated in 1980 LA, Sched. 1.) The result, it is submitted, is that neither directly, nor indirectly, does adverse possession mean that the owner must be inconvenienced.

(E) Adverse possession means a possession which is not only without right or title, but which is also without even a shadow of right or title

This remarkably imprecise suggestion has only seen the light of day once; it was invented in the decision of the Court of Appeal in **Hyde v. Pearce.**[43] It is not clear what the Court meant by a 'shadow of right'. Nor is it clear how a person with a shadow of a right is to be distinguished from a person with a full right and from a person with no right at all. However, the facts were these. The plaintiff (Hyde), agreed to purchase the disputed property at auction. He paid the usual deposit and a date was fixed for completion. But Mr. Hyde did not wait for completion. He went into possession immediately under what was found to be a determinable licence. The problems began shortly after the due date for completion when the vendors discovered that they had inadvertently contracted to sell Hyde a little more than they could convey. A small reduction in the purchase price was therefore offered, but was not accepted. At this stage the vendors demanded possession and they were found to have

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43. [1982] 1 All E.R. 1029.

determined Hyde's licence, although the contract was to continue on foot. Later, the vendors invoked a contractual provision for arbitration, but nothing further was said about the defendant's possession. For reasons which were not explained, nothing else happened, except that Mr. Hyde remained in possession for the next 14 years.

Then, for reasons which again were unexplained, the vendors contracted to sell the same property to the defendant. At about the same time, Mr. Hyde went to prison (as a result of a rating dispute) and the defendant took the opportunity to enter the property, demolish it and rebuild. Predictably, on being restored to liberty, Hyde brought action alleging he had acquired a title by adverse possession. He obtained judgement at first instance. In the Court of Appeal, however, it was held that time had not run in his favour.

One reason given for the decision was that Hyde's status as a purchaser pending completion (which on the facts gave him no rights at all) was inconsistent with the status of an adverse possessor. This part of the decision appears to suggest that only a trespasser without shadow of right can be an adverse possessor.

Is the case correctly decided on this point? This must be doubtful. There is no previous authority for this view. On the contrary, earlier cases[44] show that provided a cause of action has accrued, a person who is not a trespasser and who does have a right to be in possession, may be in adverse possession for the purposes of the legislation. It is true, of course, that there are instances in which time does not run in favour of an occupant with a particular status. For example, time does not normally run in favour of beneficiary, or a bailiff, servant, agent or guest.

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44. See e.g. **Moses v. Lovegrove**, cited above; **Hughes v. Griffin** [1969] 1 W.L.R. 23, **Re Cussons Ltd.** (1904) 73 L.J. Ch. 296; **Bridges v. Mees** [1957] Ch.47.

But this is not because there is a general rule that time cannot run unless the possessor is a trespasser with no colour of title. The real reason why time does not run in the examples given is because in these cases no cause of action to recover possession will normally have accrued to the owner. It is the existence of a cause of action which is important - not the particular status held by the occupant. This is the reason why time might in fact run in favour of, for example, a mortgagor or an oral periodic tenant in some cases. Such persons are not trespassers and have much more than a mere shadow of a right. Nevertheless, time may run in their favour, simply because they are possessors and the statute provides that a cause of action is to be treated as according against them in prescribed circumstances.

In **Hyde v. Pearce**, since the court found that a cause of action had accrued and since Hyde was manifestly in possession, the Court ought, on the basis of previous authority, to have concluded that Hyde was in adverse possession. The actual decision in the case, if followed in future, will inevitably introduce an element of uncertainty into the law. It would then be doubtful whether time could ever run in favour of someone in lawful possession. More particularly, there would be doubt whether time could run in any case in which a valid and enforceable transaction was not completed with all formalities necessary to vest a legal estate; for example, could time run in favour of someone in possession after an informal sale, exchange, partition or realignment of boundaries? Could the statute operate after an informal gift or a void conveyance or lease? Would the Act still provide a cure where the boundaries of land conveyed, as drawn on a plan, did not coincide with the boundaries which exist on the ground?

It is possible that the decision in this case was fair to the parties before the court; possible, but not certain, since the reason for the vendors' conduct was not explained. But fairness was bought at a high price if the operation of the Statute is to be uncertain and if it could no longer quiet titles after an informal or invalid disposition.

The only crumb of comfort is that, since the case is inconsistent with previous authorities, as well as being widely regarded as wrong, it seems possible that it will be either confined to its own special facts, or rejected as **per incuriam.**

Conclusions

None of the five meanings which have been canvassed for "adverse possession" is satisfactory. Versions (a) and (b) are indistinguishable; they are circular and add nothing to the law. Versions (c) and (d) have been either rejected by the Courts or by Parliament and version (e) ought to go the same way. It is suggested that, if the Statute is to achieve its objectives, there is no meaning which can be given to "adverse possession" other than that first suggested above, namely that "adverse possession" means simply the possession of someone not disqualified by the Act from pleading the Statute. This is the simplest meaning and undoubtedly that intended by the draftsman.

It is also the version which accords most fully with the policy of certainty pursued by the law of limitations. Versions (a) and (b) are unnecessary complications. Versions (c) and (d) would introduce new, positive requirements on which it would be difficult or impossible to check years after the events had occurred. These versions, it will be submitted when the cases of **Littledale v. Liverpool College** and **Leigh v. Jack** are considered in detail, would seriously undermine the healing tendancy of the Statute and devalue the guarantee of security which the Statute provides

in conveyancing. Version (e) (for the reasons mentioned above) would similarly undermine the Statute and ought also to be disregarded.

The only voiced objection to the meaning of "adverse possession" here contended for, is that it is "tautologous in some cases".[45] It is quite true that there are instances in which a cause of action having accrued (e.g. on a dispossession) **ex hypothesi**, someone other than the true owner is in possession. But no argument by deduction can be founded on the simple, obvious and inescapable fact that in many possession cases, two things will co-exist: the accrual of a cause of action to recover possession and the existence of someone in possession. The crucial point demonstrated by **Smith v. Lloyd** and **Trustees, Agency Co. v. Short** is that the two things do not always co-exist. That is the reason for the requirement of "adverse possession". Something which is only "tautologous in some cases", is not really tautologous at all.

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45. L.S.G., 12 March 1980, p.271.

CHAPTER 6

POSSESSION REFERABLE TO A LAWFUL TITLE

General

As was mentioned in the introduction to this part of the thesis, this chapter deals with a suppositious general maxim of the law of limitations. For it has been said that a possession may fail to be adverse within the meaning of Schedule 1, para. 8 of the Limitation Act 1980 by reason of the rule that:

"possession is never adverse if it can be referred to a lawful title".[1]

If this maxim were a universal truth, it would impinge, to some extent, on the scheme of the legislation. Worse, however, is the risk that the spurious principle - which is itself in origin the product of judicial activism compounded by confusion of thought - will lead to further and more dangerous developments which might prevent the Statute achieving its objectives.[2]

But the development of the alleged maxim to date first be considered.

The maxim is considerably older than either paragraph 8, or its orinal, section 10 of the 1939 Act. It seems to be older than even the R.P. L.A., 1833; indeed, Lightwood considered, with good reason, that the principle formed part of the old doctrine of non-adverse possession.[3] If so, it nevertheless survived the abolition of that doctrine by the R.P.L.A.

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1. Page-Wood, V.C., in **Thomas v. Thomas** (1855) 2 K.& J. 79. 83; Preston and Newsom, 2nd ed., 71, cited with approval in **Moses v. Lovegrove** [1952] 2 Q.B. 533, 540.
2. As an example of this process at work, see **Hyde v. Pearce** [1982] 1 All E.R. 1029, criticised (1983) 46 M.L.R. 89 (M.S.D.), considered, Chapter 5 above.
3. Time Limits, 7, referring to **Doe v. Brightwen** (1809) 10 East 583.

1833.[4] But whilst the principle survives, it now has only limited application. For it is quite clear that there are some cases in which time may run even though the possession is referable to a lawful title. Time may run, for example, in favour of a tenant who ceases to pay rent under an oral lease, even though he remains a tenant for all purposes other than those of the Limitation Act.[5] Similarly, time may run in favour of a mortgagee in possession of mortgaged land under the mortgage.[6] Time may also run, in some circumstances, in favour of a beneficiary under a trust who is in possession.[7]

However, although the application of the old principle has been limited by Statute, the principle has nevertheless been said to be relevant in at least five situations. The relevant cases are said to be where the alleged adverse possessor (1) has an estate by courtesy, or (2) enters under a wrongful conveyance of the fee by a limited owner, or (3) is an infant's bailiff; or (4) is a tenant at will; or (5) is a licensee at will. The first 3 examples were collected by Preston and Newsom; the fourth was added by the Courts and to this, the fifth example is analogous.

The first two examples require little detailed comment. The first can now be discounted since it depended on the law of courtesy which is now of no practical significance.

The second example given by Preston and Newsom[8] is where a person

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4. See e.g. **Thomas v. Thomas**, above; **Bolling v. Hobday** (1882) 31 W.R.9; **Corea v. Appuhamy** [1912] A.C.230, P.C.; **Moses v. Lovegrove** [1952] 2 Q.B. 533; **Bridges v. Mees** [1957] Ch. 475.
5. L.A. 1980, sched.1. para. 5; **Moses v. Lovegrove**, above; **Howard v. Chaloner** [1968] 1 Q.B. 107, 122; **Hughes v. Griffin** [1969] 1 W.L.R.23; **Jessamine v. Schwartz** [1976] 3 All E.R. 521; **Paradise Beach v. Price-Robinson** [1968] A.C. 1072.
6. L.A., 1980, s.16.
7. L.A., 1980, sch. 1, para.9, proviso.
8. Limitation, 3rd ed., 89.

enters under a wrongful conveyance of the fee by a limited owner (e.g. a tenant for life); in this case it is stated that the possession is not adverse so long as the interest of the limited owner is subsisting. This is a puzzling example. It is true that, after 1925, such a wrongful conveyance is void at law. But it is not quite clear against whom the authors suggest that the possession is non-adverse - is it e.g. the tenant for life or the remainderman? It would seem that until the death of a tenant for life, a remainderman has no right to possession. Until that date no cause of action to recover possession accrues to the remainderman and there is therefore no question of the possession being adverse to him. But equally, the life tenant during his own life has no right to possession and no cause of action in equity once he has purported to convey the property. In equity, he is treated as having assigned his life interest. Once again, therefore, there can be no question of the possession ever being adverse.

The case of **Pedder v. Hunt** [9] is cited by Preston and Newsom in support of their statement. But the case does not solve the mystery of the authors' meaning. The facts were that a tenant for life conveyed in fee to the defendant's predecessor. More than 6 but less than 12 years after the life tenant's death, the plaintiffs (who were entitled in remainder) brought an action to recover possession. It was held that a cause of action accrued to the plaintiffs on the death of the life tenant and that the appropriate limitation period was 12 and not 6 years.

The limitation period had not been cut down from 12 to 6 years by what is now L.A. 1980, s.15 (2), which operates where "the person entitled to the preceding interest" was out of possession when his interest deter-

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9. (1887) 18 Q.B.D. 565.

mined. The reason was that the life tenant having conveyed the property, he ceased to be "the person entitled". That person was in fact the defendant.

The case did not therefore turn on whether the possession was adverse or not and the Court did not refer to or attempt to apply the principle under consideration. Consequently, the case is not really a satisfactory illustration of the principle that possession is never adverse if it can be referred to a lawful title.

But the third example of the principle requires more detailed consideration.

The Infant's Bailiff

At common law, it seems that an infant was allowed to treat anyone, stranger or relative, intruding on his lands as his bailiff for the purpose of bringing an action of account to recover rents and profits.[1] But no similar rule of law seems to have existed in the case of ejectment so as to affect the operation of the Statutes of Limitation. The question whether an occupier was an adverse possessor or a bailiff for an infant might of course arise; but for limitation purposes the question was merely one of fact for the jury.[2]

In equity, however, a more convenient remedy[3] of account was available against a person who took possession of the land of an infant. The infant was here again allowed to treat any intruder as his bailiff and on this basis could compel the intruder to account for rents and profits.[4] The remedy was available against any intruder, relative or stranger.[5] And it could be used not merely to have an account of rents and profits, but also to obtain possession of an estate.[6] At the beginning of the 19th century, no statutory period of limitation applied directly to this equitable remedy available to an infant. But it became established that whilst an account of rents and profits could be brought after the infant came of

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1. Co. Lit., 89b. 90a. **Hughes v. Harrys** (1631) Cro. Car. 229; **Doe d. Barnett v. Kean** 7 T.R. 386.
2. **Doe d. Roffey v. Harbrow** (1833) 3 Ad. and El.67, n; see also **Lambert v. Browne** (1871) Ir.R.5 C.L. 218.
3. **Sturton v. Richards** (1844) 13 M & W. 17; **Carlisle v. Wilson** (1807) 13 Ves. 276; **A.C. v. Dublin Corp.** (1827) 1 Bli. (N.S.) 312.
4. **Newburgh v. Bickerstaff** (1684) 1 Vern. 295; **Yallop v. Holworthy** Eq.C. Abr.7; **Morgan v. Morgan** 1 Atk. 489; **Dormer v. Fortescue** (1744) 3 Atk.124; **Bloomfield v. Eyre** (1845) 8 Beav.250; **Hicks v. Sallitt** (1853) 3 D.M.& G. 782; **Wyllie v. Ellice** (1848) 6 Hare 505; **Boddy v. Lefevre** 1 Hare 602. n; Co. Lit. 89b. 90.
5. **Morgan v. Morgan** 1 Atk. 489; **Dormer v. Fortescue** (1744) 3 Atk. 124; **Quinton v. Frith** (1868) 2 Ir. R. Eq.396; **Howlett v. Howlett** [1949] Ch.767.
6. **Dormer v. Fortescue** (1744) 3 Atk.124; **Howard v. Shrewsbury** (1874) L.R. 17 Eq.378.

age and could be carried back to the moment the infant's right accrued,[7] if the infant neglected to enter for 6 years after he came of age, then by analogy with the Limitation Act 1623, section 3, he would also be barred from bringing a bill for an account of profits.[8]

In **Thomas v. Thomas,**[9] however, an attempt ws made to use the doctrine of the infant's bailiff for a new purpose. In that case, on the death of his wife, the plaintiff's father took possession of settled property to which his children were entitled as tenants in common. He retained possession for precisely 20 years until his own death. A bill was then filed against his executors and devisees seeking, amongst other things, a declaration of the parties rights, and praying that the plaintiff might be let into possession of the property. For what appears to be the first time,[10] it was argued in **Thomas v. Thomas** that since an infant could treat any intruder as his bailiff for the purpose of obtaining an account of rents and profits, then he could also treat an intruder as a bailiff for the purpose of escaping from the Statute of Limitations on a claim by bill to possession.

The defendants, on the other hand, argued that there was no presumption of law that any intruder entered as a bailiff for an infant owner, so far as a claim to be let into possession was concerned. Such an allegation, it was said, was a question of fact. And it was also cogently pointed out that not every trespasser who entered on the lands of an infant could be treated as a bailiff; for if he could be, there would be no reason

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7. **Dormer v. Fortescue; Howard v. Shrewsbury; Hicks v. Sallitt; Bloomfield v. Eyre,** above.
8. **Lockey v. Lockey** (1719) Prec. Ch. 518; **Hicks v. Sallitt,** above; **Knox v. Gye** (1872) L.R. 5 H.L. 674; **Friend v. Young** (1897) 2 Ch. 431; c.f. **Wall v. Stanwick** (1887) 34 Ch.D. 763.
9. (1855) 2 K.& J. 79; 25 L.J. Ch. 159; 1 Jur. (N.S.) 1160; 4 W.R. 135.
10. But see **Hagley v. West** (1824) 3 L.J. O.S. Ch. 63.

to include infancy among the statutory disabilities which extend the limitation period.

This point was accepted by Wood V.-C., who declined to hold that an infant could treat any intruding stranger as his bailiff for the purpose of escaping from the Statute of Limitations. Nevertheless, the Vice-Chancellor did hold that the entry of the father in these circumstances must prima facie be presumed to have been on behalf of his infant children and as their natural guardian[11], unless there was strong evidence to the contrary. It was held, therefore, that the Statute did not bar the plaintiff's claim.

After the decision in **Thomas v. Thomas**, which was quickly accepted and acted upon, a number of questions remained (and some still remain) to be settled.

1. Who can be treated as a bailiff

The first problem is to determine when an intruder will be treated as a stranger, so that the limitation period will run from the entry into possession, and when, on the other hand, he must be treated as bailiff. In **Thomas v. Thomas**, Wood V.-C., clearly indicated, on good grounds, that he did not think that all intruders could be treated as bailiffs for the purposes of the Statute of Limitations. Thus the cases which establish than an infant may treat any intruder as a bailiff for the purpose of obtaining an account of rents and profits are not therefore necessarily relevant and may be and may be misleading. One of the difficulties in dealing with cases which purport to follow **Thomas v. Thomas** is that they do not generally distinguish rigorously between the authorities relating to "bailiff for the purpose of obtaining an account" from those which deal with "bailiff

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11. The term bailiff, guardian, trustee are used interchangeably in this context, **Wyllie v. Ellice**, above.

for the purposes of avoiding the Statute of Limitations".[12] However, it would seem that for present purposes a guardian and the following near relatives may be treated as bailiffs:

a) a father: **Thomas v. Thomas; re Hobbs: Hobbs v. Wade;**[13] **Tinker v. Rodwell;**[14] **Quinton v. Frith;**[15]

b) a mother: **MacCormack v. Courtney;**[16] **Mulhern v. Dorian;**[17]

c) an uncle: **Pelly v. Boscombe,**[18] where the plaintiff's uncle was neither her natural nor her socage guardian but was her nearest male relative and was the executor named in the will of her father, from whom she claimed as heiress.

d) a brother: **Rice v. Begley**[19]

e) a sister: **Smith v. Byrne**[20]

The "bailiff" principle has also been held to apply to a stranger - such as a purchaser - who enters with full notice of the infant's rights.[21]

2. Determination of the character of bailiff

Preston and Newsom[22] state that it is now settled that the character of a bailiff's possession may change so as to allow the former bailiff to plead the Statute. However, it seems that the character cannot change at all before the infant attains his majority.[23] Even after the child is

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12. See e.g. **Wall v. Stanwick** (1887) 34 Ch.D. 763, 767; **Pelly v. Bascombe,** (1863), 4 Giff. 390; **Quinton v. Frith** (1868) 2 Ir. R. Eq. 396.
13. (1887) 36 Ch.D. 553.
14. (1895) 69 L.T. 591.
15. (1868) 2 Ir. R. Eq. 396.
16. [1895] 2 Ir. R.97.
17. (1883) I.L.T.R.74.
18. Cited above.
19. (1920) I Ir.R.243.
20. (1914) 1 Ir.53.
21. **Young v. Harris** (1891) 65 L.T. 45; **Quinton v. Frith** (above); **McMahon v. Hastings** (1913) 1 Ir.R. 395.
22. Third ed., 91.
23. **McMahon v. Hastings** (1913) 1 Ir.R.395; cp. **Re Howlett** [1949] Ch.767, 774.

21, Wood V.-C. in **Thomas v. Thomas** seems to have thought that the father could not change the character of his possession:

> if this gentleman entered as guardian, this Court would never allow him to set up any other title to the estate". [24]

Nevertheless it now does seem settled that after the child is 21, the relationship may be changed. A demand for and a refusal to deliver possession has been held sufficient,[25] as has the departure of the child from the possession with full knowledge of his rights and failure to make a claim for many years.[26] On the other hand the mere fact of the infant attaining 21, or marrying, is insufficient.[27] The intruder is taken to continue in the same capacity unless something is done to change the character of the possession.[28] The onus of proving the change is on the defendant:[29] but laying out a large sum in building and improvements will apparantly not do.[30]

3. The nature of the concept of "the infant's bailiff"

As indicated above, in **Thomas v. Thomas** Wood V.-C. based his decision on a rebuttable presumption that a father entered on behalf of his children. Possibly the doctrine is still based on presumption. A moral obligation to look after the infant's interests:

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24. 2 K.& J. 85.
25. **McMahon v. Hastings**, above.
26. **In re Maguire and McClelland's Contract** (1907) 1 Ir.R. 383; but cf. **Tinker v. Rodwell**, above, and **Rice v. Begley**, above, where it was held that each case depended on its own facts, and departure without claim did not determine the relationship where the claimant was unaaware of his right.
27. **Tinker v. Rodwell**, above, **McMahon v. Hastings**, above.
28. **Hobbs v. Wade** (1887) 36 Ch.D.553.
29. **Tinker v. Rodwell**, above.
30. **Pelly v. Bascombe**, above.

> "only raises a presumption, though a strong one, in favour of the person in possession being a bailiff".[31]

And there is a Canadian decision which makes the same point in the clearest possible language:

> "The defendants contention is, substantially, that because the plaintiff is their stepmother, the law permits no other conclusion than that her possession was merely as their "bailiff" as to their shares in the land; but I cannot consider that there is any such irrebuttable presumption. It must always be a question of fact for whom the possession was taken and held, and ordinarily the finding should be that the possession of the parent is that of the child, for parents do not ordinarily take undue advantage of their children"...[32]

However although few of the English decisions have discussed the point directly, in some cases, the intruder seems to have been constituted bailiff as if by rule of law rather than because of a presumption. For example, in **Hobbs v. Wade** it was held that a father "**must be taken** to have entered.... as bailiff for his infant son" (emphasis supplied). This case provides a particularly nice illustration, since the father was not held to have entered as bailiff to his elder son, who was adult, although the evidence of the capacity in which the father entered was the same for both his sons. And it might have been thought that the reasoning of the Canadian Court quoted above..."parents do not ordinarily take undue advantage of their children"... was as apt for elder as for the younger son.

The case of **Tinker v. Rodwell** also suggests that something more than a presumption is at work. There it was said that:

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31. Preston and Newsom, 3rd ed., 90.
32. **Fry and Moore v. Spears** (1916) 26 D.L.R.796.

> "the law is undoubted that the father must be held to have taken possession as natural guardian and on behalf of the son, so that the Statute of Limitations would clearly not run..." [33]

The application of the doctrine in the decided cases also suggests that "rebuttable presumption" is not an adequate explanation. If the doctrine could properly be said to be based on rebuttable presumption, one would expect to find cases in which the presumption has in fact been rebutted. There seems to be no such English[34] case.

Despite Wood V.-C's statement in **Thomas v. Thomas** that strong evidence would rebut the presumption, no rebuttal was achieved where the defendant entered under an informal set-off[35] , or as a purchaser,[36] albeit one with knowledge of the infant's right. If the presumption cannot be rebutted in these cases, one might doubt whether it can ever be displaced. The inability of a bailiff to repudiate his agency and become an adverse possessor during the minority of an infant owner also suggests that something more than a presumption is at work. It is possible that the difficulty, mentioned above, of distinguishing authorities relating to "bailiffs for the purpose of taking an account" from "bailiff for the purpose of avoiding the Statute" has led to misunderstanding in some cases. But if the reported cases are all properly decided, then we seem to be dealing here with a particularly virile presumption - a presumption which is so strong that it is indistinguishable from a rule of law.

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33. **Tinker v. Rodwell**, above at p.592, emphasis supplied. See also **Quinton v. Frith** (1868) 2 Ir.R.Eq.396, 415; **Paradise Beach v. Price-Robinson** [1968] 2 W.L.R.880.
34. Cp. **Fry and Moore v. Speare**, above, (Can.,).
35. **Pelly v. Bascombe**, above.
36. **Young v. Harris, Quinton v. Frith, McMahon v. Hastings**, above.

Policy

Although it is difficult to find a comprehensive statement of the policy behind the doctrine, three reasons seem to be dominant. First there is the commonsense idea that "parents do not ordinarily take undue advantage of their children" or, alternatively, that a parent would normally enter to protect a child's right against intrusion by strangers rather than on his own behalf. Second, there is no doubt an idea that in many cases the possessor is under a moral obligation to the child which is sufficient to justify constituting him bailiff. Third, and perhaps most important, there is also no doubt a tenderness on the part of the Court to the plight and the hardship caused by the Statute to an ousted infant, and a willingness to avoid the consequences of the operation of the Act when fairness seems to demand it.[37]

4. How is the infant's bailiff disqualified?

This penultimate section considers why an infant's bailiff cannot take advantage of the Statute.

Preston and Newsom take the view that an infant's bailiff "stands in a fiduciary relationship which does not permit him to rely on the Statute".[38] And they also state that the "infant's bailiff" is the most important application of the principle that "possession is never adverse if it can be referred to a lawful title", which was indeed said to be the applicable principle by Vice-Chancellor Wood in **Thomas v. Thomas.** This reasoning assumes that the infant's bailiff always has a lawful title to the land in his capacity as bailiff so as to preclude the existence of advese possession.

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37. On this ground the principle has been extended from infants to the insane. **Smith v. Byrne** (1914) 1 I.R.53. **Leonard v. Walsh** (1941) I.R. 25.
38. Third ed. p.90.

In fact, in many cases the bailiff's title is fictitious; he will not actually have any right or title at all; in such cases he may be treated as a trespasser.[39] A more direct explanation for the bailiff's inability to rely on the Statute is that adopted by Lightwood[40] and by Franks.[41] Their theory is that the possession of an agent or bailiff, even the possession of a presumed bailiff, is that of his principal. Since the infant is himself in possession and since no cause of action to recover the land accrues to the infant while he himself possesses, time never begins to run. It seems better in principle to adopt this more direct explaination. Nevertheless, the cases themselves are ambiguous, and there could be no practical objection to treating the bailiff as disqualified because he is a fiduciary or trustee.[42] For today "precisely the same limitation result would be achieved by applying the results applicable to such persons".[43]

Conclusion

Although the 1925 legislation (particularly the imposition of a trust whenever property is conveyed or devised to an infant) has substantially reduced the practical application of the doctrine of the infant's bailiff - only one case, involving gavelkind and a death intestate before 1926,[44] has been reported since 1925 - the doctrine nevertheless remains of interest for two reasons. First, because it is said to be the most important application of the principle that possession is never adverse if it can be referred to a lawful title. Second, because doctrine is an example of the way in which the Courts have manoeuvred to avoid the application of the Statute

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39. **Wyllie v. Ellice**, above.
40. Time Limits, 30; and see **Quinton v. Frith**, above.
41. Limitation, 118.
42. See e.g. **Wall v. Stanwick** (1887) 34 Ch.D.763; **Quinton v. Frith** (1868) 2 Ir.R, Eq.376 **Graham v. Chambers** (1902) 36 I.L.T.108.
43. Franks, Limitation, 18; in 19th century, treating the bailiff as trustee would not have sufficed, for under R.P.L.A. 1833 time could run in favour of a constructive (but not an express) trustee. An infant's bailiff fell into the former category: **Price v. Phillips** (1894) 11 T.L.R. 86.
44. **Howlett v. Howlett** [1949] Ch.767.

in what was considered to be a hard case. The decided cases in this area show little sympathy with the Statute, despite the express extension of time allowed to infants. The cases also show considerable judicial creativity in the effort to side-step the Statute. Regrettably, none of the cases demonstrate any attempt to balance the hardship to the individual litigant before the Court against the public disadvantage consequent on a limitation rule which does not operate with certainty. With the important exceptions of **Maguire &. McClelland's Contract** (above) and **Rice v. Begley** (above), the cases do not appear to show any appreciation at all of the general policy underlying the limitation of actions to recover land.

In these circumstances, it is perhaps fortunate the doctrine does not prevent the Statute achieving its objectives. It is true that the doctrine might mean that an old claim could be litigated. And there is therefore a little danger that some such claims might be affected by staleness, e.g. a case might turn on whether a defendant purchaser took - many years before - with or without notice of the infant's rights. But the imposition after 1925 of a trust whenever an infant is beneficially interested in land - and the ability of the trustees to effect disposition binding on the infant - mean that such cases are unlikely in practice.

Cases of hardship are also just possible. Although the balance of hardship will normally favour the infant, hardship might occur if a claim were able to succeed after an innocent defendant had peaceably occupied for many years and, e.g. after making substantial improvements to the land. Again, however, such cases seem unlikely to arise frequently in practice after 1925 when an adult trustee ought always to be available to preserve the infant's rights.

Finally, the existence of the infant's bailiff doctrine does not seem in practice to affect prejudically the quality of the statutory guarantee of security of title which the Statute aims to provide. It seems that time

would immediately start to run against an infant's right to recover possession if the bailiff himself went out of possession and a third party entered. But if the third party entered before the infant reached majority and with notice of his rights, the third party would then himself take as bailiff. This means that, in theory at least, it is just possible that a paper title might come into existence (e.g. the transfer from original bailiff to third party might mature into a root of title) without time ever having started to run. In theory, therefore, a claim based on this doctrine might in some circumstances be enforced even against a bona fide purchaser for value without notice who purchased a legal estate which had its origins in a conveyance by an infant's bailiff.[45]

In practice, however, such claims are unknown.[46] The doctrine does not therefore in practice seem to prejudice the policy of the statute.

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45. By virtue of L.A. 1980 s.18(2), (3).
46. No claim brought in the circumstances mentioned in the text appears ever to have been reported in this country; nor is there any mention of any such claim in any work on land law, real property, the limitation of actions, conveyancing or the investigation of title to land which the writer has been able to consult. Further, no such claim appears to have been brought to the attention of any of the official bodies (mentioned in Chapter 12, below) which have reviewed either the law relating to the limitation of actions to recover land or the law relating to the investigation of title to land. Finally, although the writer has enquired on an informal, ad hoc basis amongst practitioners, no claim made in the circumstances suggested has ever been mentioned to him.
    Of course, this evidence does not prove beyond all possible doubt that such claims never occur. Nevertheless, in this instance, it is suggested that the negative evidence available (albeit imperfect) is in fact sufficient to support the conclusion that such claims do not occur so frequently that they constitute a threat to the policy of the statute.
    At a number of subsequent points in this thesis, reference is made to the absence of knowledge in the profession of particular types of claim being made in particular circumstances. (The absence of professional knowledge of particular types of claim being made against a purchaser who has investigated an apparently regular paper little in the conventional way, is in some instances referred to as "the conveyancing evidence".) In general, such statements are based on: the absence in the law reports and in text books of instances of such claims or mention of the possibility of such claims; absence of notice of such claims in evidence submitted to official law reform or review bodies; absence of knowledge of such claims amongst such practioners as the writer has consulted on an informal, ad hoc basis.
    The limitations to which this type of imperfect, negative evidence are subject are borne in mind whenever reference is made to it and whether or not express mention is made of limitations or imperfections.

Tenancy at Will

Before 1833, the operation of the Statute was made uncertain by the possibility that a possessor might have been in possession by virtue of a tenancy at will and by the difficulty of discovering when, if at all, such a tenancy had been determined and adverse possession commenced. This uncertainty seems to have persuaded Lord Campbell, the draftsman of the 1833 Act, to formulate a rule which gave certainty but which appeared harsh and unfair to later generations.[1] By section 7 of the R.P.L.A. 1833, a tenancy at will was to be deemed to have determined and a cause of action accrued (so time would run) from the end of one year from the creation of the tenancy, or at the date of its actual determination if earlier.

However, in practice this provision (1939 Act, s.9 (1)) did not always[2] operate so as to give absolute certainty. The Statute would operate from the end of the first year, even if the tenancy was afterwards actually determined within the statutory period. But if a new tenancy was then created, the former presumed determination became irrelevant and time began to run afresh.[3] Similarly, if the landlord resumed actual possession, time began to run afresh, even if the tenant remained on the premises throughout.[4] The effect of the Statute could also be avoided if the occupier was found not to have had exclusive possession but to have been a servant, agent or licensee; after the decision in **Cobb v. Lane** (below) it was generally appreciated that even exclusive possession did not necessarily require the court to find a tenancy at will.

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1. The draftsman may even have revised his own views - see **Randall v. Stevens** (1853) 2 E. & B. 641, (Lord Campbell C.J.).
2. **Day v. Day** (1871) L.R.C.P. 760.
3. **Turner v. Bennett** (1840) 7 M.& W. 226, 9 M.& W. 643; **Locke v. Mathews** (1863) 13 C.B.N.S. 753.
4. **Randall v. Stevens**, above; **Allen v. England** (1862) 3 F.& F. 49.

It was because of this latter development that the Law Reform Committee recommended [5] that the "tenuous distinction" between a tenancy at will and a gratuitous licence should be removed and that time should only run in the case of a tenancy at will from the original date of determination of the tenancy.

This recommendation was enacted by the Limitation Amendment Act 1980 which provided simply that section 9 (1) of the 1939 Act should cease to have effect.

Accordingly, in the case of a tenancy at will, time will now run from the determination of the tenancy and the accrual to the landlord of a cause of action to recover possession.[6] In future, therefore, in many cases of long continued possession, there may once again be doubt whether the occupation did not originally commence as a tenancy at will and, if it did, as to the date, if any, on which the tenancy was actually determined. This is a particularly potent form of uncertainty for two reasons. First, because of the frequency with which the law has traditionally presumed a tenancy at will and second, because of the wide variety of ways in which such a tenancy might be determined.

Conclusions

Does the 1980 amendment now prevent the Stature from achieiving its objectives? Each of the substantive objectives at the Statute must be considered in turn.

(a) Staleness

It was pointed out above that the rule which existed from 1833 to 1980 and started time running on a tenancy at will after one year did not always operate in practice so as to avoid all question of the nature

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5. 1977, Cmnd. 6923, para.3.55.
6. **Doe d. Jacobs v. Phillips** (1847) 10 Q.B.130; **Burroughs v. McCreight** (1844) 1 Jo. & Lat. 290.

and effect of the defendant's possession. However, the repeal of that rule has greatly increased the scope for disputes and hence for litigation on stale issues. It is now possible to open the question of the original nature of the possession of the party relying on the Statute after any length of time. If a tenancy at will can be found or is presumed, it will then be necessary to investigate the whole subsequent history of the occupation to discover if the tenancy has been determined. If a determination is found it will be necessary to consider whether or not a new tenancy was thereafter created. There is, therefore, some danger that stale issues might now be litigated. (Possibly, however, this danger might be avoided in difficult cases of long and quiet possession by applying a presumption that the tenancy, if not acted upon, must have been determined.)

(b) Hardship

Cases in which the 1980 amendment might lead to hardship are also clearly possible, although perhaps not in so short a period (12 years) as was formerly prescribed, if a person who entered as a tenant at will can now be ejected after any length of possession.

Here again, however, in appropriate circumstances, the Court might be prepared to avoid hardship by presuming that, after long and quiet possession during which the tenancy had not actually been acted upon, the original tenancy must be taken to have been determined.

The use of presumptions to quiet title is of course an uncertain process. In some cases, therefore, where an occupation is known to have been begun by entry as a tenancy at will, it may be very many years before the title could be regarded as marketable or as good security for an investment either by the occupant or any third party. This may result in the property not being developed or utilised efficiently for some years.

(c) Conveyancing Implications

The effect of the 1980 amendment does slightly reduce the value of the guarantee of security provided by the Statute for those investigating a title. In the future, even investigation from a good root of at least the necessary age may prove in some cases to be unreliable. For it is possible that, concealed behind any root, there might be a subsisting tenancy at will, on the determination of which the lessor might successfully claim possession from even a bona fide purchaser without notice.

In practice, however, this risk is probably very small. First, in such a case, if the issue is at all doubtful, the Court may be unwilling to find that a tenancy did exist.[7] Second, even if such a tenancy is proved to have existed, it will certainly have been determined when the tenant first parted with or abandoned possession, at least if the lessor had notice of the act,[8] as he usually will. Third, if the creation (at a remote date) but not the determination of the tenancy can be proved, the Court may be prepared to presume a determination (e.g. by lost notice). The risk to a purchaser therefore seems to be small.

But against all these dangers, must be weighed the effect of the risk on owners.

The old rules were clearly unfair to owners. It is true that an owner might always have preserved his position against a tenant at will by the simple expedient of taking an annual written acknowledgement of his title from him. But this expedient was little known and rarely resorted to in practice, so that the owner's position was invariably precarious. It

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7. **Magdalen Hospital v. Knotts** (1879) 4 App. Cas. 324, 336; **Webster v. Southey** (1887) 36 Ch.D.9; **Doe d. Jacobs v. Phillips** above; **In re Cussons** (1904) 73 L.J. Ch. 296.
8. **Pinhorn v. Souster** (1853) 8 Exch. 765; **Day v. Day**, above.

is also true that recently, the Court have seemed willing to escape from the statutory trap by finding a licence rather than a tenancy at will. This did alleviate the problem for owners. But it did nothing to avoid the risks of hardship and stale claims as mentioned above. There seems in fact to be no easy way to resolve this conflict between the need for a rule which is certain and a rule which is fair. All that can be said today is that current judgement (that of the Law Reform Committee and of Parliament), possibly correctly, resolves the conflict by coming down on the side of fairness.

Licence

The intention of the draftsmen of the Acts of 1833 and 1874 seems to have been that time should run in favour of any permissive occupier after the expiration of one year.[1] But whilst this was the result achieved where the occupier was a tenant at will, the Acts made no mention of licensees.[2] There is little doubt that the explanation for this "oversight" is that in the 19th century if the Court found that a person was in exclusive possession of law, then he could not be regarded as a licensee.[3] If, for example, a person was allowed into possession rent free and for an indefinite period, the possession could not be explained by licence, but a tenancy at will would be found.

However, the distinction between a tenant and a licensee came into special prominence in the 20th century in decisions made under the Rent Acts. And in such cases it began to be held that exclusive possession was not a test negativing the possibility of the occupier being a licensee. The distinction between a lease and a licence was held to depend on the intention of the parties rather than on rules of law. This approach was soon extended to limitation cases and it enabled the Courts, on occasions, to escape the consequences of finding an occupier to be a tenant at will in whose favour time had run.[4]

In **Cobb v. Lane,**[5] a defence based on section 9 (1) of the 1939 Act (tenancy at will deemed to determine at the expiration of one year) was rejected on the narrow ground that the defendant had only a licence and not a tenancy at will. But the Court of Appeal did not go on to consider the general position of a licensee under the Statute. That issue, however,

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1. See **Scott v. Nixon** (1843) 3 Dr.& War. 388, 405.
2. **Lynes v. Snaith** (1899) 1 Q.B. 446.
3. **Cobb v. Lane** [1952] 1 All E.R.1199, 1201.
4. **Megarry & Wade**, 4th ed., 1018.
5. Above.

was raised directly in **Hughes v. Griffin.**[6] In that case, a testator, (the appellant's husband) conveyed his small-holding to the respondent who was his nephew. The testor and the appellant continued to live on the property as before and it was not until some time later that the respondent was told of the conveyance.

Thereafter, there was evidence that the testator had remained in occupation with the respondent's permission and this was held to be by licence rather than by tenancy at will.

After the testator's death, the respondent sought an order for possession of the property against the widow who had continued in occupation. It was argued that the claim was barred by the Statute because, by virtue of what is now paragraph 3 of schedule 1 of the 1980 Act, the plaintiff's right of action was to be treated as having accrued more than 12 years before action brought, on the date of the conveyance to the respondent, no one having been in possession by virtue of that conveyance.

Surprisingly, the Court of Appeal did not consider whether or not the testator himself had been in possession by virtue ofthe conveyance or whether a cause of action had otherwise accrued to the owner on general principles. But the limitation defence was nevertheless rejected, on the grounds that a licensee could not be in "adverse possession".

The reason that the possession of a licensee was not adverse was because:

"possession is never adverse if it can be referred to a lawful title".[7]

The idea that the Statute cannot run in favour of a licensee, because

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6. [1969] 1 All E.R. 460, noted (F.R. Crane), (1969) 33 Conv. (N.S.) 211.
7. [1969] 1 All E.R. 460, 464.

a licensee is not an adverse possessor is now well-established in the law. In **Wallis's Holiday Camp v. Shell-Mex**,[8] for example Lord Denning M.R. said that:

> "it has been held many times in this court that acts done under licence or permitted by the owner do not give a licensee a title under the Limitation Act 1939. They do not amount to adverse possession".

Indeed, this reasoning seems to have been tacitly accepted by Parliament. When the Limitation Amendment Act 1980[9] abolished the doctrine of "necessary inconvenience" or "imputed licence", (discussed below) it did so by providing that for the purpose of determing whether a person is in adverse possession, no licence should be imputed merely because the occupation did not inconvenience the owner of the land. The implication of the provision is of course that where a licence is properly found by the Court on the facts, then that is still relevant in determining whether there is adverse possession of the land.

However, this idea that it is the requirement for "adverse possession" which somehow excludes licensees from relying on the Statute ignores to some extent the plain words of what is now LA 1980, schedule 1, paragraph 8 (1).

As the history of the provision (Chapter 5) shows, the original intention were was merely to ensure that the substantive provisions of the Statute would not operate unless someone was in possession throughout the statutory period. That person had to be someone against whom the owner had, or was deemed to have, an accrued right of action and who was not disquali-

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8. [1975] 1 Q.B. 74, notes (P.R. Crane), (1975) 39 Conv. (N.S.) 57; see also **E.R. Ives v. High** [1967] 3 1 All E.R. 504, 510, 513, **Heslop v. Burns** [1974] 3 All E.R. 406; **British Railways Board v. C.J. Holdings** C.A. unrep. 25.3.74, Bar Lib. No.81; **Gray v. Wykeham-Martin** C.A. unrep., 17.1.77.
9. Now consolidated in L.A. 1980, sched.1, para.8 (4).

fied from relying on the Act. Naturally enough, the provision was therefore drafted so that it operated at the moment when a right of action would otherwise accrue to the owner, either on general principles or under the terms of the Act. Now where a licence is still subsisting, no cause of action to recover possession yet exists, so that the moment at which paragraph 8 can begin to apply has not yet arrived.

It is submitted that time does not run in favour of a licensee because no cause of action accrues during the subsistence of the licence, rather than because a licensee is not an "adverse possessor".

A licensee is certainly not an "adverse possessor". He is not "a person in whose favour the limitation period can run", but this is only because he is not a person against whom a cause of action exists.[10]

Determination of Licences

The only work devoted solely to the English law relating to licences in land acknowledges:

> "a licensee seeking to establish title by adverse possession has not the advantage of a tenant at will of a notional determination of his permission to be on the land (as he did prior to 1.8.80) but this does not mean that a person who enters as a licensee can never establish a title by adverse possession. Just as time will begin to run in favour of a tenant at will on the determination of the tenancy...so also time will run in favour of a licensee on the determination of his licence"[11]

Although no authority seems to exist for this proposition, it is in accordance with principle and there is little doubt that it is correct. However, the events upon which an occupation licence will determine will necessarily depend on all the particular circumstances of the case. In the case of a bare licence,[12] or (subject to the terms of the contract) in the case

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10. **Powell v. McFarlane** [1979] 38 P.& C.R. 452, 469.
11. Dawson and Pearce, Licences, 177.
12. Dawson and Pearce, 71.

of a contractual licence, it seems likely that the licence will be required at least to make plain any alleged change in the character of his occupation from licensee to adverse possessor.[13] This might be done by express notice[14] to the owner or possibly by acts or a course of conduct which is inconsistent with continued existence of the licence. It is by no means clear, however, whether a licensee will invariably be allowed to unilaterally repudiate the licence under which he occupies and thereafter to rely on the Statute - a tenant for a term of years is denied this privilege and the same rule might be extended to licences in appropriate cases.

There may also be cases where a licence arising under the doctrine of benefit and burden cannot be determined without the agreement of the licensor.[15]

Although, therefore, in principle time will run from the determination of a licence and the accrual of a cause of action, it may not always be easy to actually determine a licence or to establish that the appropriate determining events have in fact occurred. This will cause uncertainty in any case in which a licence may have existed.

Conclusions

Do the rules relating to possessory licences prevent the Statute from achieving its objectives? In general the answers to that question are the same as those suggested in the previous section of this thesis dealing with tenacies at will. The specific points made there are not repeated here.

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13. This is required of an infant's bailiff, a servant or an agent. **Tinker v. Rodwell** (1895) 69 L.T. 591; **Lyell v. Kennedy** (1889) 14 App. Cas. 437; **Hunter v. Crawford** (1842) 5 Ir. L.R.407; **Rice v. Begley** (1920) 1 Ir.R.255; **Leonard v. Walsh** (1941) Ir.R.25.
14. Cf. **Powell v. McFarlane** [1979] 38 P.& C.R.452; **Hyde v. Pearce** [1981] 1 All E.R. 1029.
15. E.g. as **E.R. Ives v. High**, above.

But it should perhaps be stated here that, in general, the very existence of licensed possessors, in whose favour time does not run, is an inroad on the policy of certainty embodied in the Statute. It is suggested (above) that the object of the legislation in the 19th century and probably even that of the 1939 Act, was that time should run in favour of a permissive occupier after the expiration of one year, unless the owner took the precaution of insisting on an annual acknowledgement of his title. Judicial creation of the idea of "licensed possession" has undermined this policy and has made the operation of the act less predictable. A possession which at first sight appears to be adverse may turn out on closer examination to have begun by licence. At the present time, in any case in which the Statute is relied on, there may be doubt whether a licence has existed or has been determined and if so, on what date. However, few instances have yet come to light in which the "healing tendency" of the Statute has been impaired by a licence - certainly too few for the risk of uncertainty posed by licences to give cause for real concern. In these circumstances, the present rule (although not without risks) is not open to serious criticism.

"Posssession is never adverse if it can be referred to a lawful title"

Summary

In this chapter, the above principle is considered. It is noted that it is not a principle of general application, for in some cases time does run even though there is a lawful title; but five cases in which the principle might apply are considered.

The first two of those examples (possessor entitled to an estate by courtesy, or one who claims under a wrongful conveyance in fee by a

limited owner) may be dismissed as unimportant or erroneous. The third example, the infant's bailiff, is more difficult. Although the principle has been said to operate in this case, the title or right to which the possession of an infant's bailiff is referred, is generally fictitious. In the few cases in which the "bailiff" actually has a right to possession as guardian, no cause of action to recover possession accrues to the infant and accordingly time does not run in any event. However, in most cases in which the "infant's bailiff" rule has been applied, the bailiff has no real title or right at all, but is a mere trespasser. And more direct and attractive explanations exist for refusing to permit the infant's bailiff to rely on the Statute - first, he may be a trustee and so disqualified by the Statute itself; alternatively, second, he may be an agent whose possession is that of his principal.

The fourth and fifth examples (licensees and tenants at will) also present difficulty. In these cases the possession may certainly be referred to a lawful title or right, and time will not run. There may also be other cases in e.g. tenants for years, whose possession is so referable. But it is submitted that the real reason why time does not run during the subsistence of a licence or a tenancy at will is because no cause of action to recover the land accrues until the licence or tenancy is determined. There is therefore nothing to start time running.

Of course, as Romer L.J. pointed out in **Moses v. Lovegrove**, in general the existence of a lawful title and the absence of a cause of action to recover possession are co-extensive.

> "that is to say, if the owner has given a contractual right or permission to occupy, then he cannot bring an action for eviction, and vice versa".[1]

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1. [1952] 2 Q.B. 533, 540.

And the Courts seem to be as happy with the one explanation as with the other. For example, in **Palfrey v. Palfrey** Lord Denning M.R. said that long possession under a licence would not bar the owner because:

> "the owner does not have a right to possession until the licence is determined. So time does not run against the owner until he determines the licence". [2]

This can be contrasted with **British Railways Board v. C.J. Holdings**[3] where the alternative explanation was given by the same judge:

> "It has been held many times in this Court that acts done under licence or permitted by an owner do not give the licensee a title under the Limitation Act. They do not amount to adverse possession".

To say, therefore, that a possession is not adverse because it can be referred to a lawful title will virtually amount to no more than saying that no cause of action has accrued or is to be deemed to have accrued against the possessor. Nevertheless, in general it is desirable to refer to the accrual of a cause of action rather than to the nature of possession; this is in conformity with the scheme and terminology of the Act. Other terminology will inevitably lead to damaging confusion. [4]

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2. Unrep., C.A., 5.12. 73, Bar Lib. No.416A; and see also **Powell v. McFarlane** [1979] 30 P.& C.R.452, 569.
3. Unrep., C.A., 25.3.74, Bar Lib. No.81.
4. See, e.g. **Hyde v. Pearce** [1982] 1 All E.R.1029.

CHAPTER 7

PRESENT INTERESTS IN LAND-POSSESSION

Introduction

This chapter deals with possession - a concept which is central to a study of the operation of the Statute. For, as explained in Chapter 5, before time can ever run someone must be found to be in adverse possession of the land. But "adverse possession", it was suggested, means nothing more than the possession of a particular type of person; someone who is not disqualified from relying on the statute. An examination of the idea of possession used in this branch of law is therefore critical for any attempt to discover (as this thesis attempts to do) whether the Statute is properly adapted to achieve its objectives.

However, before dealing generally with the idea of possession, this chapter first deals with two related ideas - "dispossession" and "discontinuance of possession". It was explained in Chapter 5 that the establishment of adverse possession is a general pre-condition for the running of time. However, it was also explained in that chapter and in Chapter 4 that the general scheme of the Act is to make time run from the accrual of a cause of action; and that the Act contains a fairly comprehensive code of provisions which fix the date on which a cause of action is to be treated as accruing in a variety of circumstances. In the case of present interests in land, a cause of action to recover possession will (by virtue of the code) accrue on the occurrence of either a "dispossession" or a "discontinuance of possession". It is convenient to deal with these two ideas first in this Chapter because it will be submitted (below) that they are in fact indistinguishable from the idea of taking possession

Dispossession and Discontinuance

When a person claiming land, or his predecessor in title, has been in possession of land, and has while entitled to the land been dispossessed or has discontinued his possession, a right of action is treated by the Statute as having accrued. Time then runs from the date of dispossession or discontinuance.[1]

The Statute draws a distinction between dispossession and discontinuance of possession. The classic statement of this distinction is that of Fry J. in **Rains v. Buxton.**[2]

> "In my view, the difference between dispossession and discontinuance of possession may be expressed in this way - the one is where a person comes in and drives out the others from possession; the other is where the person in possession goes out, and is followed into possession by other persons".

But Fry J.'s statement does require qualification. Dispossession may certainly occur where a person comes in and drives another from possession. But a driving out is not always required. It seems that all that is required is an assumption of possession.

> "When we find on the one side (the squatter's) acts of user and on the other (prior owner) none or practically none, I should be much inclined to say that there had been a dispossession - that is, that legally the plaintiffs have been in possession".[3]

No "driving-out" was required there.

A similar line was taken in **Treloar v. Nute**[4] by Pennycuick V-C. who

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1. L..A. 1980, sched. 1, para. 1.
2. (1880) 14 Ch.D. 537, 539.
3. **Littledale v. Liverpool College** [1900] 1 Ch. 19, 25, per Sir F.H. Jeune. Accordingly, a man can acquiesce in his own dispossession - Re Vernon's Estate [1901] 1 I.R.1, 7.
4. [1977] 1 All E.R. 230, 234 noted, F.R. Crane, (1977) 41 Conv. (N.S.) 134. See also **Powell v. McFarlane** [1979] 38 P.& C.R. 452, 469, 470. Lightwood, Time Limits, p.33.

doubted that there was any real difference between the concept of taking possession and the concept of dispossession.

> "Where the person claiming by possession establishes possession in full sense of exclusive possession, that by itself connotes absence of possession on the part of the paper owner and I doubt if there is any real difference in the concept of taking possession and the concept of dispossession".

It seems in fact that the true test of whether a rightful owner has dispossessed or not is simply whether an action for possession of the land lies at his suit against some other person.[5]

The meaning of "dispossession" has not, however, been free from controversy in recent years. The doubts arise from the effects of the judgements in **Leigh v. Jack** as interpreted in the later case of **Wallis's Holiday Camp v. Shell-Mex.**[6] In **Wallis**, Bramwell L.J. in **Leigh v. Jack** was treated as having laid down the rule that in order to dispossess an owner, a squatter must not only have taken possession but his acts must also be such as to inconvenience or prejudice the true owner.

This **modern** rule, it will be explained below, has now been reversed by Statute, so that it can no longer have any bearing on the meaning of "dispossession". But it will also be submitted (below) that, considered in its proper context, the **original** rule in **Leigh v. Jack** (which is still good law) actually had no bearing on the meaning of "dispossession" in any event. It is therefore submitted in this thesis, that "dispossession" has no special meaning beyond "taking exclusive possession".

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5. Hals, Laws, 4th Limitation para. 769; cf. **Williams Bros. v. Raftery** [1958] 1 QB 159, noted, F.R. Crane, (1958) 22 Conv. (N.S.) 63; cf. **University of Essex v. Djemal** [1980] 2 All E.R. 742.
6. (1879) 5 Ex. D. 264; [1975] 1 All E.R.94, noted, F.R. Crane, (1975) 39 Conv. (N.S.) 57.

Discontinuance

Discontinuance is generally regarded as meaning the abandonment of possession, followed by the actual possession of another person.[7]

In the leading case of **Leigh v. Jack**, all three judgements in the Court of Appeal cast light on various aspects of abandonment. First, Cotton L.J. pointed out that in every case, it is necessary to look at the nature of the property in question.[8] If the owner is exercising such acts of ownership as would ordinarily be done by an owner in possession, or is excluding others from doing so, there will be no question of his having discontinued his possession.[9] Even very slight acts done on the land may be sufficient to negative discontinuance.[10]

> "The smallest act would be sufficient to show that there was no discontinuance ... the circumstances that within 20 years before suit the plaintiff repaired the fence ... is strong to show that there was no discontinuance".[11]

Bramwell L.J. also gave some further examples. In the case of a house, if some furniture was left, or a board with a notice that it was to let (although the board had been knocked down)[12] or if the owner mended a roof or window there would be no discontinuance. It would be otherwise if there were no such acts. As to other property:

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7. **Doe v. Bramston** (1835) 3 A. & E. 63;
   Cannon v. Rimmington (1852) 12 C.B.1;
   Leigh v. Jack above;
   Rains v. Buxton (1880) 14 Ch.D. 537;
   Leigh v. Jack (1879) 49 L.J. Q.B. 220; 42 L.T. 463; 28 W.R. 452.
8. Above.
9. See e.g. **Ward v. Bruce** [1959] 2 Lloyd's L.R. 472, 478
10. (1879) 42 L.T. 463; **Powell v. McFarlane** [1979] 38 P. & C.R. 452, 468.
11. Conversely, tearing up a fence has also been held to negative discontinuance - **Littledale v. Liverpool College**, cited above, at p. 21.
12. (1879) 42 L.T. 463; cf. Bramwell L.J.'s remarks in **Low Moor v. Stanley** (1876) 34 L.T. 186.

> "Although it is difficult to understand how there could be a discontinuance of possession as regards an enclosed field I think there might be as regards unenclosed land outside the field in the absence of any act done towards it, as in the case of a house".[13]

Even where there is no user at all, there will not necessarily be a discontinuance. As Cockburn C.J., in an often quoted phrase, pointed out:

> "If a man does not use his land, either by himself or some person claiming through him, he does not necessarily discontinue possesion of it". [14]

The question of discontinuance is one of fact depending on the circumstances of the case. So that it has been held that mere non-user was not of itself evidence sufficient to warrant finding a discontinuance in the case of a mine[15] or a quarry[16], or a turf bog[17], or a site for redevelopment[18].

On the other hand, the departure of the former possessors to a distance, without appearing to have received any rent or made any demand, is the strongest evidence of their intending to abandon at once all occupation and all claim of ownership.[19]

Abandonment alone, however, is not enough to constitute "discontinuance". Possession by another is also required. The reason for this requirement was considered, above, in Chapter 5.[20]

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13. (1879) 42 L.T. 463.
    See e.g. **Cunliffe v. L.N.W.R.** (1888) 4 T.L.R. 278;
    But cf. **Norton v. L.N.W.R.** (1879) 13 Ch.D. 268; **Searby v. Tottenham** (1868) L.R.. 5 Eq. 409; **Kynoch v. Rowlands** [1912] 1 Ch. 527.
14. (1879) 5 Ex. 264.
15. **Low Moor v. Stanley**, above.
16. **McDonnell v. McKinty**, (1847) 10 Ir. L.R. 514.
17. **Convey v. Regan** [1952] I.R. 56.
18. **William Bros. v. Raftery**, above.
    Tecbild v. Chamberlain [1969] 20 P. & C.R. 633;
    Redhouse Farms v. Catchpole, unrep., C.A. 12.11.1976.
19. **Doe v. Bramston** (1835) 3A. & E.63.
20. **McDonnell v. McKinty** (1847) 10 Ir. L.R. 514;
    Smith v. Lloyd (1854) 9 Ex. 562;
    Trustees, Agency v. Short (1888) 13 App. Cas. 793.

Conclusions

In the result, whether the case is alleged to be one of dispossession or discontinuance of possession, it is submitted that the position might be summarised by saying that an adverse claimant must establish that he has been in exclusive possession for the full statutory period. Possession is of course required in all cases if time is to run - see above, Chapter 5. The second part of this chapter therefore deals with possession.

Possession

At its commencement, possession of land for limitation purposes is traditionally regarded as consisting of two elements: **(1)** a physical element ("corpus possessionis") which may be shown by the exercise of exclusive control; and **(2)** an element of intention, commonly referred to as "animus possidendi".[21]

Corpus

It has been said that the physical elements in possession consist "positively, in the exercise of control by the possessor, and, negatively, in the exclusion of others".

In other words, the physical element in possession can be demonstrated either positively, by showing acts of enjoyment; or negatively, by showing acts which exclude others, such as fencing, ejecting, warning off or taking proceedings against trespassers. In practice, possession is most often demonstrated by a combination of acts of user and acts of exclusion. And in practice, acts of user may also amount to acts of exclusion. For example, the act of living in a house not only uses the property; it also excludes others. Again, picking and eating all the cherries on a tree is an act of user; but it is a user which also excludes others from the fruits of ownership.

Nevertheless, for purposes of exposition, in the following part of this chapter, an attempt is made to separate acts of user from acts of exclusion.

(i) Control/Acts of User

Since land is not capable of complete physical control, the best that can be done to demonstrate enjoyment or general control is to show a more or less discontinuous series of acts of dominion, the sufficiency of which will depend on the nature of the land itself.

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21. **Powell v. Mcfarlane** [1979] 38 P. & C.R. 452, 469.

> "As to possession, it must be considered in every case with reference to the peculiar circumstances. The acts, implying possession in one case, may be wholly inadequate in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests - all these things, greatly varying as they must, under various conditions, are to be taken into account in determining the sufficiency of a possession".[23]

The principle here is straightforward. Acts which might be sufficient to demonstrate possession of one parcel of land (e.g. shooting over a swamp, or taking sand and stone from foreshore) will be wholly inadequate in the case of other types of land e.g. prime agricultural land. But the application of the principle is rather more difficult. Since possession is a relative concept, it is not possible to lay down precise rules about the character and amount of enjoyment or use necessary to constitute possession. Every case must depend on its own circumstances.[24] One is therefore driven back on examples. The following acts will suffice in the following cases: a dwelling or other structure - by exclusive occupation of it.[25] Farmland - by farming it;[26] a garden - by gardening or using it as a garden;[27] a swamp

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23. Per Lord O'Hagan, **Lord Advocat v. Lord Lovat** (1880) 5 App. Cas. 288.
Neill v. Devonshire (1882) 8 App. Cas. 135, 165;
Kirby v. Cowderoy (1912) A.C. 599, 603;
Johnston v. O'Neill (1911) A.C. 583.
24. **Lord Advocate v. Young** (1887) 12 App. Cas. 544;
Marshall v. Taylor (1895) 1 Ch. 641, 645.
25. **Palfrey v. Palfrey**, unrep., C.A. 5. 12. 73, Bar Lib. No. 416A (a house);
Spectrum v. Holmes [1981] 1 All E.R. 6 (a flat);
Rains v. Buxton, above, (a cellar).
26. **Seddon v. Smith** (1877) 36 L.T. 168;
Cunliffe v. L.N.W.R. above;
Norton v. L.N.W.R., above;
Bligh v. Martin [1968] 1 W.L.R. 804.
27. **Marshall v. Taylor**, above;
Hayward v. Chaloner [1968] 1 Q.B. 107, noted, F.R. Crane, (1968) 31 Conv. (N.S.) 454.
Tecbild v. Chamberlain, above.

- by shooting over it;[28] foreshore - by taking sand, stone and drift sea-weed.[29] In the case of waste land which is not being cultivated there is little that can be done to indicate possession;[30] but paying taxes will apparently do.[31]

Although, therefore, clear examples can be collected, the nature and character of land are infinitely variable, and the frequency or degree or intensity of a particular use or mode of enjoyment may be all important in deciding whether possession has been established. The judge or practitioner who has to discover what degree of user or control the law regards as sufficient to constitute possession in particular circumstances can only do so by deduction from the facts (often given in the most general terms) of reported cases and from the judicial statements (again often in general terms) made about the sufficiency of those facts for the purpose of constituting possession. For the practitioner at least, this lack of a precise rule for determining whether particular facts amount to possession inevitably introduces a degree of uncertainty into the law. This type of uncertainty may be compounded if the reported decisions are themselves contradictory or difficult to reconcile.

In practice, therefore, possession is not always a state of affairs which is unmistakable and readily ascertainable. The following matters seem to give rise to special problems.

Area of Possession

A proprietor cannot always be expected to prove that he has done acts indicating his ownership on every part of his land.[32] It is not, for example, necessary for an individual to walk over every inch of a field before it can be found that he was in the possession of the whole field.

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28. **Red House Farms v. Catchpole**, above
29. **Lord Advocate v. Young**, above.
30. **Wuta-Ofei v. Danquah** [1961] 1 W.L.R. 1286
31. **Solling v. Broughton** [1893] A.C. 556.
32. **Jones v. Williams** (1837) 2 M. & W. 326;
    Neil v. Devonshire, above;
    Loose v. Castleton [1981] 41 P. + C.R.19.

> "All that is necessary is that he should do some act from which it may reasonably be inferred that he claimed the whole ..."[33]

In the case of an enclosed area, acts doen on one part may be treated as evidence of possession of the whole:

> "Evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did".[34]

This principle can be applied not only to enclosures, but also to any case in which there is "a common character of locality" as where the land defines itself physically, e.g. "one entire belt" of woodland[35], a continuous hedge[36], the bed of a stream or a river[37], to the foreshore of a river or the sea[38], and to a strip of wasteland adjoining a highway.[39] Indeed it seems to be applicable in any case in which the boundaries of a tract are defined in some way.[40]

There is, however, some doubt whether the principle is applicable in cases of adverse possession. Lightwood[41] took the view that the principle

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33. **Hegan v. Carolan** [1916] 2 I.R. 27.
34. **Jones v. Williams** (1837) 2 M. & W. 331. And see
Bristow v. Cormican (1878) 3 App. Cas. 641, 670;
Lord Advocate v. Lord Blantyre (1879) 4 App. Cas. 770;
Neil v. Devonshire, above;
Lord Advocate v. Wemyss (1900) A.C. 48, 68;
Johnston v. O'Neill (1911) A.C. at 555, 595, 612.
35. **Stanley v. White** (1811) 14 East 332.
36. **Jones v. Williams**, (above).
37. **Jones v. Williams**, (above);
Lord Advocate v. Lord Lovat (above);
Hanbury v. Jenkins [1901] 2 Ch. 401;
Neill v. Devonshire, (above);
A.G. v. Newcastle [1897] 2 Q.B. 390.
38. **Lord Advocate v. Lord Blantyre**, (above);
Loose v. Castleton, (above).
39. **Doe d. Barratt v. Kemp** (1835) 2 Bing. (N.C.) 102.
40. **Higgs v. Nassauvian** [1975] 2 W.L.R. 72;
Clark v. Elphinstone (1880) 6 App. Cas. 170;
West Bank v. Arthur [1967] 1 A.C. 665.
41. Time Limits, 43.

operates only where the possession is taken with consent. Where an adverse possession has been taken, Lightwood thought that it extended only over the area which was actually occupied. Use of part of a property would not, on this view, raise a presumption of possession of the whole.

Lightwood relied on the authority of the case of **McDonnell v. McKinty**[42] where the disputed property was unopened quarries under certain lands. Quarries had been opened in some places under the lands, but it was held that this partial user of quarries did not confer possession of the whole.

> "Such a presumption is never made but in favour of right".
> (Blackburne C.J.)

The contemporary case of **Glyn v. Howell**[43] also supported Lightwood's view. That was again a case of underground strata where it was held that when title is founded on an adverse possession, the title will be limited to that area of which adverse possession has been enjoyed, and, as a general rule, constructive possession of a wider area will only be inferred from actual possession of the limited area, if the inference of such wider possession is necessary to give effect to contractual obligations, or to preserve the good faith and honesty of a bargain.[44]

Preston and Newsom, on the other hand, appear to take a view which is opposed to Lightwood's : they treat the presumption as to area of possession as fully applicable in cases of adverse possession.[45] They do not examine the statement made by **Glyn v. Howell** but nevertheless treat that decision as justified in the special case of adverse possession of minerals or underground strata, because:

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42. (1847) 10 Ir. L.R. 514.
43. [1909] 1 Ch. 666. Cited with approval in **West Bank v. Arthur**, above.
44. **Low Moor v. Stanley**, above.
45. Limitations, 3rd, 104.

> "If the subject matter is a mine ... its nature hardly permits the **locus in quo** to be part of a larger area (see **McDonnell v. McKinty**)".[46]

There are also statements in recent cases which support the line favoured by Preston and Newsom. In **Higgs v. Nassauvian** it was said, obiter, that

> "It is clearly settled that acts of possession done on parts of a tract of land to **to which a possessory title is sought** (emphasis supplied) may be evidence of possession of the whole".[47]

It is submitted therefore that Preston and Newsom's view is the stronger. It also seems to be better in principle since there seems to be no reason to confine the "area of possession" rule to cases where the possession appears to be lawful (there is of course no way of ensuring that it really is lawful) but there is every reason in convenience to apply the inference in cases of adverse possession. Of course, the application of the principle, and the consequence admission of evidence of acts done on other parts of one tract may not be conclusive. The evidence (even if admitted) may be entitled to little weight, especially if done in the absence of knowledge of adjoining owners able to interfere.[48] The inference may also be rebutted by counter evidence.[49] And it may, of course, be difficult in some cases even to establish that the principle is applicable. The applicability of the principle depends on finding that there is a "common character of locality". Such a decision may well involve an element of subjectivity - and subjectivity introduces uncertainty. Consequently where this principle is involved, possession may not always be unmistake-

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46. Above, page 109.
    See also **Low Moor v. Stanley** (1876) 34 L.T. 186.
47. Cited above, see also
    Convey v. Regan [1952] I.R. 58;
    Searby v. Tottenham (1868) L.R. 5 Eq. 409;
    Hegan v. Carolan, above;
    Powell v. McFarlane [1979] 38 P. + C.R. 452, 471.
48. **Lord Advocate v. Lord Blantyre,** above;
    Convey v. Regan above
49. **Jones v. Williams,** above.

able.

Easement or Possession ?

An element of uncertainty may also exist in cases where the acts which an alleged possessor claims to have done on land, might be done either as acts of possession or, alternatively, might be done by virtue of an easement.

It is not always possible to distinguish the type of acts which demonstrate possession from those which are the mark of easement.

The fact that particular acts could be done in enjoyment of an easement or a profit does not prevent them being evidence of possession.[50] And there is no rule of law which bars the acquisition of an adverse title to land by a person who is entitled to an easement over it. Difficult cases can therefore often arise.

In theory and principle, easement and possession are distinguishable. An easement is a right **in alieno solo.** A man cannot have an easement over his own land. As Lord Chancellor Hatherley explained in **Ladyman v. Grave:**[51]

> "In order to obtain an easement over land you must not be the possessor of it, for you cannot have the land itself and also an easement over it ... the law does not allow the co-existence of an easement in land with the possession of the land itself."[52]

Accordingly, whilst an easement may be compatible with the servient owner retaining the right of property to the servient tenement,[53] adverse possession is not.

This principle is brought to prominence in connection with claims to new types of easement. Of course, the list of easements is not closed.

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50. Preston & Newsom, above, 107.
51. (1871) 6 Ch. App. 763, 767.
52. When dominant and servient tenements come into the same hands, an easement may be extinguished or merely suspended pro tem. - see Megarry & Wade, 4th ed., 871.
53. **Metropolitan Rwy. v. Fowler** [1893] A.C. 416.

But claims to new types of easement must conform to the general nature of rights capable of being easements. Accordingly, claimes to rights which are so extensive that they amount in fact to an assertion of a right to possession, will be rejected. In the well known case of **Copeland v. Greenhalf,**[54] for example, Upjohn J. rejected a wheelwright's claim to stand an unlimited number of vehicles on a strip of his neighbour's land:

> "It is virtually a claim to possession of the servient tenement, if necessary to the exclusion of the true owner : or at any rate to a joint user, and no authority has been cited to me which would justify the conclusion that a right of this wide and undefined nature can be the proper subject matter of an easement".

However, although the two conceptions of easement and possession can be distinguished, it is not always easy in practice to distinguish acts done under an easement from those which might be the mark of possession. Although possession, unlike (generally) an easement, may involve the exclusive and unrestricted use of a piece of land[55] nevertheless, the possessor of land does not always have to use his land to its fullest advantage. He cannot be compelled to exhaust the beneficial user; he may choose instead to use it only for limited purposes or periods. In practice, therefore, it may be difficult to distinguish acts of possession from acts done in the exercise of an easement or indeed any other lesser right.[56] This difficulty is found in its most acute form when the nature of the property e.g. a footpath, is such that it can only be used in one way, although it may be used in that fashion either by virtue of an easement or in the assertion of possession.

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54. **Copeland v. Greenhalf** [1952] 1 Ch. 488, 498. See also
Grigsby v. Melville [1972] 1 W.L.R. 1355;
A.G. of Southern Nigeria v. John Holt & Co. Ltd. [1915] A.C. 599, 617;
Miller v. Emcer [1956] Ch. 304.
55. **Reilly v. Booth** (1890) 44 Ch.D.12, 26.
56. See F.R. Crane, (1962) Malaya Law Review, 16, 24n.

The following examples are intended to illustrate the scope of the problems.

Shooting: A sporting right may exist as a profit. Shooting may also be an act of possession.[57]

Turf Cutting: May be evidence of possession, or may be done by virtue of a profit.[58]

Taking Sand or Seaweed: May be profit (**Blewett v. Tregonning**)[59] or may be evidence of possession (**Lord Advocate v. Young**).[60]

Coal: While the right to a substratum of coal is a right to land and might be possessed, a right to take coal in another man's land can be a profit.[61]

Car Parking: A car may (apparently) be parked either by virtue of an easement or by virtue of possession of the land in question.[62]

Pasture: A profit of pasture may exist; but pasturing cattle may also be evidence of possession.[63]

Tunnels, Water Courses and Pipes: Such subterranean rights can be enjoyed either by possession or by virtue of an easement.[64]

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57. **Peech v. Best** [1931] 1 K.B.1; cf. **Red House Farms v. Catchpole** unrep, C.A., 12.11.1976.
58. **Grose v. West** (1816) 7 Taunt. 39; cf **Convey v. Regan**, above.
59. (1835) 3 A. & E. 544.
60. Above.
61. **Wilkinson v. Proud** (1843) 11 M & W. 33;
Ashton v. Stock (1877) 6 Ch. D. 719;
Sutherland v. Heathcote [1892] 1 Ch. 475, 483;
Beckett v. Lyons [1967] 1 Ch. 449, 474.
62. **Williams v. Usherwood** [1983] 45 P.& C.R. 235.
63. **Lord Advocate v. Lord Blantyre**, above;
Rigg v. Lonsdale (1857) 1 H. & N. 923 (cattlegate);
Lyell v. Hothfield [1914] 3 K.B. 911;
Haigh v. West [1893] 2 Q.B. 19.
64. **Bevan v. London Portland Cement** (1892) 67 L.T. 615, (possession of tunnel);
S.E. Rwy. v. Associated Portland Cement [1910] 1 Ch. 12, (easement of tunnel);
Criticised, Challis, (1916) L.Q.R. 70.
Lee v. Stevenson (1858) E.B. & E. 512;
Taylor v. St. Helen's (1887) 6 Ch.D. 264;
Simmonds v. Midford [1969] 2 Ch. 415.

Sign: The erection of a sign on an adjacent building may be by easement or may be possession.[65]

Lavatory: A lavatory may be used by virtue of easement or by virtue of possession.[66]

Projecting Buildings: "The law of easement may protect projecting buildings".[67] A projecting building may amount to possession of the air space which it occupies.[68]

Support: "The distinction between an easement of support and occupation of that which affords support is often very fine".[69]

Protection from the Sea: Defences may be established either by way of easement, or by virtue of possession of the land.[70]

Moorings: Piles driven into the river bed may be possessed, or the same may be done by virtue of easement.[71]

It is therefore possible for certain types of user of land to be consistent either with possession, or some lesser right such as an easement or profit. However, the extent of the problem must not be exaggerated. In general, an easement is a right which is neither exclusive nor unrestricted. The problem of distinguishing between easements etc., and possession is

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65. **Moody v. Steples** (1879) 12 Ch. D. 735;
Francis v. Hayward (1882) 20 Ch. D. 773; (1883) 22 Ch. D. 177.
66. **Miller v. Emcer** [1956] Ch. 304;
Perrott v. Cohen [1951] 1 K.B. 705.
67. Megarry & Wade, 4th, 811;
Lemon v. Webb (1894) 3 Ch. 1, 11.
68. Challis, (1916) L.Q.R. 70, 81; Real Property, 54.
Laybourn v. Gridley (1892) 61 L.J. Ch. 352;
East Stonehouse U.D.C. v. Willoughby [1902] 2 K.B. 318;
cf. Goodman, (1968) 32 Conv. 270.
69. Lindley L.J., **Lancs. Telephone v. Manchester Overseers** (1884) 14 Q.B.D. 267, 271.
cf. **Waddington v. Naylor** (1889) 60 L.T. 480 (support of wall);
Stedman v. Smith (1877) 36 L.T. 168 (possession of wall).
70. **Philpot v. Bath** (1905) 21 T.L.R. 634.
71. **Cory v. Bristow** (1877) 2 App. Cas. 262, 277, 280;
Lancaster v. Eve (1859) 5 C.B.N.S. 717.

really therefore confined to cases in which the land in question has been used in ways which are not exclusive or unrestricted. Where an adverse claimant is able to rely on more than one type of act - so that its user is not "restricted" - there will be no possibility of ambiguity. For example, it was suggested above, that taking sand from the foreshore may be an equivocal act - but an adverse possessor who can also point to other types of act done on the foreshore (e.g. taking stone, driftwood, seaweed, or seacoal) will clearly have gone beyond a user which could be consistent with a simple profit.

Even where a claimants acts are of a "restricted nature", it may nevertheless be possible to distinguish possession from other rights by enquiring whether the acts in question are so extensive that they amount to a claim to enjoyment of the whole or substantially the whole of the fruits of the land. A claim to exclusive user or enjoyment is normally too extensive to be an easement or a profit e.g. as in the case of a claim to store unlimited quantities of materials on land. There are, however, anomalous instances (drains and water courses) in which the law permits exclusive easements. And there are undoubtedly other cases which cannot be resolved by enquiring whether the claimants enjoyment of the property was exclusive. **Steadman v. Smith**[72] provides an example of an attempt to apply this test in inappropriate circumstances. In this case the plaintiff and defendant occupied adjacent plots, divided by a wall of which they were tenants in common. The defendant took the coping stones off the top of the wall, heightened it, replaced the coping stones and erected a washhouse, the roof of which occupied the whole width of the top of the wall; he also let a stone into the wall with an inscription stating that the wall and the land belonged to him.

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72. Above.

On these facts, it was held that the defendant had such exclusive enjoyment of the wall that he was in possession of it so that time would run in his favour. Crompton J. misapplied the test of exclusive enjoyment with humorous results:

> "You certainly had no longer the use of the same wall : you could not put flower pots on it, for instance ... the plaintiff is excluded from the tope of the wall : he might have wished to train fruit trees there, or to amuse himself by running along the top of it".

However, in cases where the acts themselves do not exhaust the beneficial user of the land, if a claimant can point instead to positive acts of exclusion - e.g. in the example cited above of lavatories, locking and preserving the keys of the lavatories and permitting no other users - then again, the equivocation may be resolved in favour of possession. Since an easement is not normally exclusive, locking or fencing will normally not be consistent with finding that the user was by easement. Even in this case however, fencing by itself may not necessarily be conclusive, for there may be anomalous cases in which such acts are justified under an easement. For example, in the case of a block of flats in Central London, where the tenants of each flat have a right of way over the stairs and hallways, it is quite conceivable that the tenants acting together might have a right to lock the street door, each occupant having his own key.[73]

Again **Littledale v. Liverpool College** (discussed on another point below) provides an example of an "exclusive" easement. In that case the plaintiff had erected and locked gates at each end of strip of land over which he was entitled to a right of way to reach an adjacent field. One member of the Court of Appeal, Sir F.H. Jeune, thought that in the circumstances the plaintiff had a right to erect and lock the gates by virtue of the right of way.[74]

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73. cf. **Dawes v. Adela** (1970) 216 Est. Gaz. 1405;
Pettey v. Parsons [1914] 2 Ch. 653.
74. See also **Wimpey v. Sohn** [1967] Ch. 487.

In summary, although it may be possible in some circumstances to distinguish possession from lesser rights by enquiring whether the user was exclusive or unrestricted, nevertheless a rump of cases remain in which the use made of land is truly ambiguous; in such cases, the authorities establish that it is necessary to have regard to the intention with which the acts were done. Where the acts are equivocal, the intention is all important,[75] and where the necessary intent to possess ("animus possidendi") can be shown, this may resolve any ambiguity in favour of possession.[76] It seems, that the intention colours the acts relied on as acts of possession.[77]

Now in general, intention has to be inferred from the acts of ownership relied on by the claimant. However, a claimant may be able to rely on his own contemporary declaration of intention, particularly where it is brought to the notice of the true owner.[78] More practically, an occupant who entered bona fide under a paper title can certainly rely on that fact as proof of intent to possess.[79]

But where the necessary animus possidendi cannot be unequivocally demonstrated, the claim to possession must inevitably fail.[80] In **Littledale v. Liverpool College,** the plaintiff's acts in erecting gates were held to have been done to protect his right of way and so the acts were not evidence of possession. The necessary animus possidendi had not been shown and the claim to an adverse title was rejected. A similar case was **Philpot v. Bath,**[81] where the defendants land adjoined foreshore which was vested

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75. **Littledale v. Liverpool College,** above;
Philpott v. Bath, above;
Beaufort v. Aird (1904) 20 T.L.R. 602, 603.
76. **Littledale v. Liverpool College** [1900] 1 Ch. 19, 23.
77. **Fowley Marine v. Gafford** [1968] 1 All E.R. 979, 986 (Willmer L.J.).
78. **Tecbild v. Chamberlain** [1969] 20 P. & C.R. 633, 643;
Powell v. McFarlane [1979] 38 P. & C.R. 452, 476-7;
cf. **Butcher v. Butcher** (1827) 7 B. & C. 402.
79. **Fowley Marine v. Gafford,** above.
80. **Convey v. Regan,** above, 58;
Powell v. McFarlane, above, 472.
81. Cited above.

in the plaintiff. A predecessor in title of the defendant had placed rocks and piles on the foreshore. In the Court of Appeal, Sterling, L.J. explained it was necessary to enquire what was the intention of the persons who deposited these boulders:

> "- whether the object was to acquire the strip of land for themselves, or merely to protect their adjoining land from the encroachments of the sea".[82]

The latter view was correct on the facts so that the claimants had not taken possession of the foreshore.

It therefore appears that if it is not possible to say whether the acts were done with animus possideni or were done merely in the assertion of some lesser non-exclusive right such as easement, then the acts are taken to refer to the more limited right. It is not enough that the acts **may** have been done with the intention of asserting a claim to the soil, if they may equally have been done merely in the assertion of a right to an easement or a profit. The burden of proof is on the claimant. When the acts are equivocal and the claimant cannot discharge the burden of proof, the rightful owner must get the benefit of the doubt.[83]

(ii) Exclusion of Others

a. General

Not only must the alleged possessor exercise acts of ownership or enjoyment over the land, but other persons must be excluded from doing so.[84]

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82. (1905) 21 T.L.R. 634, 636.
83. **Convey v. Regan**, above, p. 59;
Powell v. McFarlane
84. Lightwood, Possession, 14.

This rule does not, however, require the positive ejection of a prior claimant or indeed of any other person. It is merely necessary that there should be no other person exercising acts of ownership or claiming possession on the land adversely to the possessor.[85]

Enclosure is the strongest possible evidence of exclusive possession. But it is not indispensible - there may be possession of an unenclosed tract.[86] Nor, it seems, is enclosure necessarily conclusive.[87] Even fencing may be explained otherwise then by a finding of exclusive possession.

However, absolute physical control of land is not always insisted on. It is necessary to have regard to the nature of the land and the manner in which land of that nature is commonly used. Possession is sufficiently exclusive if it is exclusive as the nature of the **locus in quo** permits.[88] In the case of open land, absolute physical control is normally impractical, if only because it is generally impossible to secure every part of a boundary so as to prevent intrusion.[89]

It follows from the principle under discussion, that where there are two persons on land, each claiming possession independently of the other, neither can require actual possession without excluding the other.[90] This statement must be quickly qualified, for when possession is in fact undetermined, "possession **in law** follows the right to possess".[91]

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85. Lightwood, Possession, 14.
86. **Seddon v. Smith** (1877) 36 L.T. 168.
87. Megarry & Wade, 4th ed., 1014,
referring to **Littledale v. Liverpool College** above, **Wimpey v. Sohn**, above.
88. **Fowley Marine v. Gafford**, above, 988.
89. **Powell v. McFarlane**, above, 471. And see
Lord Advocate v. Young, above;
Johnstone v. O'Neill, above;
Lord Advocate v. Lord Lovat, above;
Bristow v. Cormican, above.
90. Lightwood, Possession, 15.
91. Pollock & Wright, Possession, 24, emphasis supplied.

> "... As soon as a person is entitled to possession, and enters in the assertion of that possession ... the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is which of these two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser".[92]

This rule, necessary though it may be, does have important consequences in the law of limitations. It can lead to considerable uncertainty where an owner continues to make some slight use of land at the same time when adverse possession is alleged to have been taken.

It was explained above that possession is maintained by the exercise of acts of ownership, and these may be acts of beneficial user (e.g. cultivation of land) or acts of exclusion (maintenance of fences and barriers).[93] These acts of ownership need not be continuous, nor need they be in all cases even frequent. It is quite possible for an owner to maintain possession of his land by exercising only slight acts of ownership at irregular intervals. But if, in such a case, an intruder enters onto the same land and also begins to make use of it, it is often extremly difficult to determine whether it is the intruder or the owner (by virtue of the rule explained by Maule, J. in **Jones v. Chapman** above) who is in possession. This problem confronted the Court of Appeal in **Leigh v. Jack**, which might confidently be called a leading case. The difficulty, however, is the lack of agreements on what the case decided. After the 1st August 1980 (the date from which the Limitation Amendment Act 1980 came into force) there may also be doubt about the continued effect (if any) of the decision.

The unravelling of these issues requires a section to itself.

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92. Maule J. in **Jones v. Chapman** (1847) 2 Ex. 803.
93. Lightwood, Time Limits, 35.

Leigh v. Jack[94]

In 1854, twenty one years and some months before action was brought, (the limitation period being then 20 years) a predecessor in title of the plaintiff conveyed a piece of land to the defendant. The land conveyed was described as bounded to the north and east by named streets which were the subject of the action. The "streets" were never in fact used by the public as highways but were names used for certain portions of waste land belonging to the transferor and which he contemplated dedicating to the public as streets. They were marked as streets on a plan prepared with a view to the sale of part of the transferor's estate for building.

Immediately after the execution of the conveyance, the defendant fenced his land on its northern boundary and subsequently erected a foundry and ironworks with windows looking out into the two streets. Thereafter, by placing a quantity of old graving dock materials, screw propellers, boilers and refuse from his foundry over the streets, he rendered them impassable for carts and horses. Persons on foot, however, did occasionally pass along the streets. In 1865, the defendant enclosed an oblong piece of one of the streets. In 1872, he completely enclosed the pieces of land. In 1876 the plaintiff commenced an action to recover the site of the intended streets.

An arbitrator and the Exchequer Division on a special case stated found for the plaintiff. The Court of Appeal upheld these decisions and found that the plaintiff had not been dispossessed by the defendant.

The present problem is one of interpretation of a remark of Bramwell L.J.[95]

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94. (1879) 5 Ex.D. 264; 49 L.J.Q.B. 220; 42 L.T. 463; 28 W.R. 452; 44 J.P. 488. The last two reports are identical; otherwise, there are notable variations.
95. (1879) 5 Ex.D. 264, 273; Bramwell L.J. was expressing th view of the court - per Hodson L.J., **Williams Bros. v. Raftery** [1958] 1 Q.B. 159.

> "I do not think that there was any dispossession of the plaintiff by the acts of the defendant : acts of the user are not enough to take the soil out of the plaintiff and her predecessors in title and to vest it in the defendant; in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it; that is not the case here, where the intention of the plaintiff and her predecessors in title was not either to build upon or to cultivate the land, but to devote it at some future time to public purposes. The plaintiff has not been dispossessed ...".

The immediate problem posed by the italicized words is of course to discover why Bramwell L.J. thought the intention of the owner was relevant. The question is, in what way is an owner's intention pertinent to and how does it have a bearing upon the establishment of possession by a claimant?

This problem of interpretation is complicated by the fact that the Court dealt with discontinuance as well as dispossession and with both **corpus** and **animus** without always expressly indicating which was under consideration. And the answer is obscured by style of the reported judgments - the variations between the different series of reports suggests that the compressed form of the reported versions of the judgments is the result of rough pruning by reporters.

However, the original answer[96] to the problem seems to have been that an owner's intention may be indirectly relevant in adverse possession cases, because it may help to show that the owner has maintained his own possession. And if the owner has maintained his own possession, no intruder can rely on the statute, since an owner and a squatter cannot both be in possession at the same time.[97] Possession is single and exclusive.[98]

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96. **Cunliffe v. LNWR** (1888) 4 T.L.R. 278;
Marshall v. Taylor (1895) 1 Ch. 641, 645;
Hindson v. Ashby (1896) 2 Ch. 1;
Lightwood, Time Limits, 35-38.
97. **Treloar v. Nute** [1976] 1 W.L.R. 1295, 1300;
Powell v. Mcfarlane [1979] 38 P. & C.R. 452, 470.
98. **Kynoch Ltd. v. Rowlands** [1912] 1 Ch. 527.

On this orthodox view, a distinction must be made between those acts of user which are and those which are not sufficient to establish detention or de facto possession.[99] Trivial or mere acts of trespass on the possession of another are not enough.[100] In contrast, in order to draw the conclusion that a change has occurred putting possession into the claimand and taking it away from the real owners,[1] acts must be proved which demonstrate continuous and **exclusive** enjoyment of the whole or substantially the whole of the fruits of the land.

If an owner performs substantial acts of beneficial user, such enjoyment of the land as a claimant may have clearly cannot be exclusive. It cannot therefore amount to possession, which is single and exclusive.[2] Possession cannot be divided.[3] An owner and an intruder cannot both be in possession at the same time.[3] Where, as explained above, neither owner nor intruder can show exclusive actual possession, the law puts possession into the owner.[5]

An owner cannot, however, always be expected to exercise substantial and continuous acts of ownership, or always use his land for a substantial purpose.[6] Difficult cases may consequently arise when the owner's purpose requires only slight and possibly infrequent[7] acts on the land. Slight acts, viewed in isolation, may not clearly demonstrate any enjoyment of the soil by the owner so as to maintain his own possession and prevent an intruder establishing exclusive control. But they may do so if explained

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99. cf. **Wallis's Holiday Camp v. Shell-Mex** [1975] 1 Q.B. 94 at 103.
100. **Leigh v. Jack** (1879) 49 L.J.Q.B. 220; 28 W.R. 452.
1. **Marshall v. Robertson** (1905) Sol. Jo. 75.
2. **Kynoch Ltd. v. Rowlands**, above.
3. Per Stamp L.J., **Wallis's Holiday Camp v. Shell-Mex**, supra, at 107.
4. **Treloar v. Nute** [1976] 1 W.L.R. 1295, 1300; [1977] 1 All E.R. 230, 234;
5. **Jones v. Chapman**, above.
6. **Williams Bros. Ltd. v. Raftery** [1958] 1 Q.B. 159, 165.
7. **William Bros.** supra, at 167;
Bligh v. Martin [1968] 1 W.L.R. 804, 811.

by and viewed in the light of his intention. It is therefore necessary to have regard to the purpose for which the owner intends to use the land.

In cases like **Leigh v. Jack** where an owner has performed only slight and infrequent acts in relation to the land during a period of alleged adverse possession by a squatter, evidence of the purposes for which the owner intended to use his land will therefore be particularly relevant. In such cases, evidence of the owner's intention may make it clear that his acts were in fact acts of possession and that he has continued to enjoy the soil despite the intrusion of a claimant who has also made some use of the land. If an owner can thus show that he has remained in possession throughout, he can avoid any defence based on the Statute.

On the other hand, if a squatter can show that his own enjoyment of the soil has been exclusive and that the owner has not been enjoying the soil at all, then the owner will be regarded as having been dispossessed. The real significance and the novelty of **Leigh v. Jack** was that it acknowledged that a claimant may be able to show exclusive enjoyment even though the owner may have also been on the land at times during the limitation period. The claimant was to be allowed to show the necessary "exclusive enjoyment" of the land, by proving that his own acts in fact prevented the owner from enjoying the soil, i.e. that his acts were such as to preclude the former owner's continued "enjoyment of the soil for the purposes for which (the owner) intended to use it". In effect, in "divided possession" cases in which both owner and claimant appear to be enjoying the soil an intruder can rely on a merely "constructive ouster". [8]

The facts of **Leigh v. Jack** provide an illustration. In that case, both parties had made some use of the land. The plaintiff intended to dedicate the land as a highway and had done acts on the land within the limitation

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8. **Leigh v. Jack**, 49 L.J.Q.B. 20, 28 W.R. 452. **Tecbild v. Chamberlain** [1969] 20 P. & C.R. 633, 646. It is of course sufficient actually to eject the owner, or effectively to fence the land against him.

period. The defendant had also used the land, but only for temporary purposes which did not interfere with the plaintiff's continued enjoyment of the soil. Since the defendant could not show that his own enjoyment of the soil was exclusive, he could not show that he had been in exclusive possession for the whole of the limitation period and could therefore not rely on the statute.

This view of the Bramwell ratio was adopted by Lord Halsbury in the Court of Appeal in **Marshall v. Taylor.** After considering the facts, the Lord Chancellor distinguished the case before him on the basis that in **Leigh v. Jack:**

> "in no sense was there any **exclusive** possession sufficient to make the possession change so as to put it in (Jack) and dispossess the real owner of the land".[9]

The same point was clearly made in **Hindson v. Ashby** by Lindley L.J.:

> "No doubt if the defendant had excluded the plaintiffs long enough from their use of the land in question the plaintiffs would have lost their rights over it, but there has not been any exclusion proved and the Statute of Limitations, therefore, is out of the question; see **Leigh v. Jack.**[10]

There is also a good deal of subsequent support for this approach. In **Williams Brothers Direct Supply Ltd. v. Raftery**[11] the plaintiffs intended to develop the land in question when the opportunity arose, but in the meantime had no use for it; their representative went on to the land twice during the relevant period and had measured it with a view to preparing a plan for development. They had later dumped rubbish on the land.

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9. [1895] 1 Ch. 641, 645. C.A. Emphasis supplied.
10. [1896] 2 Ch. 1, 13.
11. [1958] 1 Q.B. 159.

In the Court of Appeal, Morris, L.J. said that:

> "In all the circumstances it seems to me that the cumulative effect of the evidence is to make it quite impossible to say that there was actual possession in the defendant of a nature that ousted the plaintiffs from possession; there was no intention on the plaintiffs part to do other than keep the land until they could use it, and in those circumstances such measure of user as took place was not of a nature or quality, in my judgment, which could amount to an ouster by the defendant of the plaintiffs from their possession.[12]

More recently, in **Ocean Estates Ltd. v. Pinder**[13] a case of land held for future development again required consideration. The defendant's claim to a possessory title to a tract of land was rejected, one of the grounds being that his occupation by cultivation of various plots under "peripatetic system of market gardening" was not exclusive since it was not

> "inconsistent with the purpose for which the plaintiffs held the land after 1950, when they exercised powers of dominion over it in 1957 and 1959-60 by going on to the land for the purposes of inspecting it and surveying it for future development".[14]

To sum up, as counsel succinctly put it in **Hindson v. Ashby:**

> "**Leigh v. Jack** goes on the question of what acts will prove exclusion".[15]

The "original rule" in **Leigh v. Jack** can therefore be seen to have only limited application. It is not a general test of possession or dispossession. It is not a sufficient test of possession because it would be possible for a trespasser to satisfy this test without also taking possession himself. And it is not a definition of dispossession because "dispossession" in the

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12. Supra, at 173.
13. [1969] 2 A.C. 19.
14. Supra, see also **Bligh v. Martin** [1968] 1 W.L.R. 804, 811/12; **Powell v. McFarlane**, supra 484/5.
15. (1896) 2 Ch. 1.

Limitation Act denotes simply the taking of exclusive possession without consent.[16]

It is submitted that the statement of Bramwell L.J. in **Leigh v. Jack** that:

> "in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it ..."

in fact deals only with the difficult case in which it is not clear whether the intruder's occupation is exclusive because the owner may be concurrently enjoying the land.[17]

The Wallis Case

Until recently, the principle in **Leigh v. Jack** appeared intelligible, although the application of the rule may have been strained in some of the later cases in favour of owners. But current uncertainty concerning the meaning to be attributed to the judgment of Bramwell L.J. on the point of dispossession, dates from the decision in **Wallis's Cayton Bay Holiday Camp Ltd. v. Shell-Mex & B.P. Ltd.**[18]

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16. Subject to the effect of **Wallis's Holiday Camp v. Shell-Mex** [1975] Q.B. 94, considered, infra. **Treload v. Nute** [1976] 1 W.L.R. 1295, 1300; 1 All E.R. 230, 234.
Powell v. McFarlane [1979] 38 P. & C.R. 452, 469.
17. One difficult application of the principle is to land over which there is a public right of way. It is not clear whether use by the public preserves the owner's title:
see **Haigh v. West** (1893) 2 Q.B. 19 (adverse title acquired, subject to public right of way).
cf. **Tottenham v. Byrne** (1861) 12 Ir. C.L.R. 376 (public user preserves original possession).
Reilly v. Thompson (1877) 11 Ir. R.C.L. 238;
and see also in re **Duffy's Estate** (1897) 1 I.R. 307;
Coverdale v. Charlton (1878) 4 Q.B. 104, 118.
18. [1975] Q.B. 94 106.

In April 1961 the plaintiffs bought a farm adjoining their holiday camp. Excluded from the conveyance was a strip of land running through the farm, which had previously been sold to the County Council as the site of a proposed new road. Also excluded was the disputed land, approximately one acre in size, abutting the line of the proposed road and which had previously been conveyed to the owner of an adjacent garage. In September 1961, the garage proprietor sold the disputed land to the defendants who intended to develop it as a filling station or garage when the proposed road was built. At no material time was there anything on the land to mark a distinction between the plaintiffs' and the defendants' property, which therefore appeared to be a pasture field belonging to the farm. There was no convenient access to the disputed land except over the plaintiffs' property or the existing garage site.

For ten years the plaintiffs, through a subsidiary farming company, carried out normal farming activities on their land, on the disputed land and (by licence of the County Council) on the site of the proposed road. The disputed land was subsequently used as a "visual frontage amenity" for the holiday camp. In 1972 the road-building proposals were abandoned and the defendants wrote to the plaintiffs offering to sell the disputed land to them. The plaintiffs took advice, but did not reply. In June 1973 the defendants began to fence the boundary of the disputed land for the first time - the plaintiffs then claimed a possessory title under the Limitation Act 1939.

As the powerful dissenting judgment of Stamp L.J. made clear, on an application of existing law to the facts, the plaintiffs might reasonably have anticipated success. Their occupation and use of the land had been continuous, exclusive of the true owners and exercised with an intention to possess.[19] They had used the disputed land in the same way as their

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19. [1975] Q.B. 94 106.

adjoining property, while the owners were not shown to have done anything in relation to the land. But the plaintiffs' claim was rejected by a majority in the Court of Appeal.

In delivering the leading judgment, Lord Denning M.R.[20] denied that actual possession was sufficient to found a possessory title.

> "There is a fundamental error in that argument. Possession by itself is not enough to give a title. It must be adverse possession. The true owner must have discontinued possession or have been dispossessed and another must have taken it adversely to him. There must be something in the nature of an ouster of the true owner by the wrongful possessor. That is shown by a series of cases in this court which, on their very facts, show this proposition to be true.
>
> "When the true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it, and so leaves it unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some temporary purpose, like growing vegetables. Not even if this temporary or seasonal purpose continues year after year for 12 years or more : see **Leigh v. Jack** (1879) 5 Ex.D. 264; **Williams Brothers Direct Supply Ltd. v. Raftery** [1958] 1 Q.B. 159; and **Tecbild Ltd. v. Chamberlain** [1969] 20 P. & C.R. 633. The reason is not because the user does not amount to actual possession. The line between acts of user and acts of possession is too fine for words. The reason behind the decisions is because it does not lie in that other person's mouth to assert that he used the land of his own wrong as a trespasser. Rather his user is to be ascribed to the licence or permission of the true owner. By using the land, knowing that it does not belong to him, he impliedly assumes that the owner will permit it : and the owner, by not turning him off, impliedly gives permission. And it has been held many times in this court that acts done under licence or permitted by the owner do not give a licensee a title under the Limitation Act 1939. They do not amount to adverse possession; see **Cobb v. Lane** [1952] 1 T.L.R. 1037; **British Railways Board v. G.J. Holdings Ltd.**, March 25, 1974; Bar Library Transcript No. 81 of 1974 in this court".

This passage in the judgment of the Master of the Rolls was subsequently interpreted in a variety of ways.[21] However, the view which prevailed in later cases[22] treated Lord Denning M.R. in **Wallis** as fundamentally

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20. [1975] Q.B. 94, 103, Ormond L.J. concurred in dismissing the appeal. For the grounds on which he is to be treated as so concurring, see **Powell v. McFarlane** [1979] 38 P.& C.R. 452, 482; **Gray v. Wykeham-Martin.** C.A. Unrep., 17.1.1977, Bar Lib. No.10A.
21. Compare, **Treloar v. Nute**, supra; **Powell v. McFarlane**, supra; Law Reform Committee, 21st Rep., 1977, HMSO, Cmnd. 6923.
22. **Powell v. McFarlane; Gray v. Wykeham-Martin**, supra.

re-interpreting the rule in **Leigh v. Jack** and thereby creating what was called the doctrine of "necessary inconvenience".[23]

On this view, "**Wallis**" required that the acts of an intruder must substantially inconvenience or appreciably prejudice the former owner of the land before time would run. However continuous and far-reaching an intruder's acts may have been, if the necessary interference or inconvenience to the owner could not be shown, the intruder's occupation would be treated as having been enjoyed by the owner's licence. This was the case even though no licence was actually given and even though none could have been implied on the facts for any purposes other than those of the Act. The end result of treating the intruder's occupation as permissive was of course that time did not run, for occupation by permission of an owner does not amount to the independent or adverse possession which the Statute requires.[24]

The facts of **Powell v. McFarlane**[25] illustrate the application of the doctrine. In that case, the owner had no practical use for a 3 acre plot of poor agricultural land at the time when a 14 year old intruder commenced sporadic farming activities on it; nothing which the intruder did, therefore, inconvenienced the owner at that moment. Nor did the owner have any specific future plans for the land. So the intruder's activities would not have appreciably prejudiced the owner in the future.

Since the owner had not been inconvenienced, the intruder was treated as occupying by virtue of licence. The owner had not therefore been dispossessed and the Statute did not operate.

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23. (1977) 41 Conv. (N.S.) 134, (Professor Crane).
24. 1980 Act. Sched. 1, para. 8.
25. Supra.

The effect of Wallis

The "**Wallis**" re-interpretation was startingly different from the original view of **Leigh v. Jack.** The "original rule" in **Leigh v. Jack** was applicable in "multi-occupation" cases and aimed to discover whether an intruder or the owner had been in possession. The rule did not depend on the notion of an invented licence.

In **Wallis** on the other hand, the court was not trying to discover who was in possession at all. The **Wallis** rule took as its starting point the establishment of actual possession by an intruder.[26] The Court then enquired whether the owner was inconvenienced by that possession - only if the necessary inconvenience was discovered did the Statute operate.

There were two other important distinctions. First, under the **Wallis** rule, the owner was not required to do any physical act in relation to the land in order to preserve his title against an intruder. Second, it was not necessary that the owner should have future plans for the land. In fact, if the owner had no particular intention, it was more difficult to establish that he was inconvenienced.

A comparison of **Leigh v. Jack** and **Wallis** reveals the problems. The decision of the majority of the Court in Wallis, on any view, contained an entirely novel statement in the modern law and one of doubtful merit.[27] Left unchallenged, the rule would have entirely subverted the policy of the Statute.

Accordingly, with commendable speed, the Law Reform Committee recommended[28] that the law should be restored to the traditional approach, that:

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26. **Treloar v Nute**, supra, p. 1299; **Powell v. McFarlane**, supra, p. 470.
27. **Powell v. Mcfarlane**, supra, 484; Law Reform Committee, 21st Rep., 1977, Cmd. 6923, para. 3.52.
28. 1977, Cmnd. 6923, para. 3. 48.

> "if a squatter has taken possession of land belonging to another and remains in possession for 12 years to the exclusion of the owner, that represents adverse possession and accordingly at the end of the 12 years the title of the owner is extinguished. That is the plain meaning of the statutory provisions". [29]

The recommendation was substantially embodied in what is now paragraph 8(4) of schedule 1 of the 1980 Act:

> "(4) For the purpose of determining whether a person occupying any land is in adverse possession of the land it shall not be assumed by implication of law that his occupation is by permission of the person entitled to the land merely by virtue of the fact that his occupation is not inconsistent with the latter's present or future enjoyment of the land.
>
> This provision shall not be taken as prejudicing a finding to the effect that person's occupation of any land is by implied permission of the person entitled to the land where such a finding is justified on the actual facts of the case". [30]

The Statute therefore appears to have abolished the doctrine of necessary inconvenience and prevents the implication of non-existent licences. It does not, however, prevent a tacit but real licence from being found on the facts, where evidence will justify such a finding.

However, a point of doubt remains concerning the effect of the 1980 Act on the original rule in **Leigh v. Jack.** It has been suggested in this section that the **Leigh v. Jack** line of cases was re-interpreted in **Wallis** The re-interpretation was root and branch; it appears to have deprived the original rule of any independent existence. Accordingly, it might be thought that **Leigh v. Jack** has necessarily fallen with **Wallis.** This may lead to difficulty. It will still be necessary after the 1980 Act for a claimant to show possession before time will run; possession must still be exclusive. No doubt cases will arise from time to time in which it will be necessary for the Court to decide whether the person in possession

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29. Sir John Pennycuick in **Treloar v. Nute** [1976] 1 W.L.R. 1295, 1300.
30. Subject to transitional provisions, Sched. 2, 1980 Act.

was an intruder or an owner who has exercised only slight and possibly infrequent acts on the land in pursuance of his purposes. It seems likely, therefore, that the reasoning on which **Leigh v. Jack** was based may still be required. If the decision itself has been abrogated, nevertheless the reasoning on which it was based must be regarded as having survived.

Animus Possidendi

It was stated above that possession of land for limitation purposes is traditionally regarded as consisting of two elements, an element of exclusive physical control and an element of intention commonly referred to as **animus possidendi**, which is the subject of this section.[1] The problem here is that the authorities on the meaning of **animus possidendi** are inconsistent. It is undoubtedly by the law that a squatter must have an occupation which is in fact exclusive of the owner. It is not clear, however, whether it is sufficient if the squatter merely intends to possess, or whether he also required to intend to exclude the owner. The conflict is between a recent decision of the Privy Council on the one hand, and a long line of cases starting in the Court of Appeal on the other.

The doctrine in the Privy Council requires an adverse possessor to have **animus possidendi** in the sense of an intention to exercise control and/or to exclude strangers; but it does not require the claimant to have a conscious intention to obtain title or to physically exclude the true owner.

In **Ocean Estates Ltd. v. Pinder**[2] the defendant's claim to possessory title was rejected at first instance on the ground (amongst others) that until a date which was within the relevant limitation period, his entry was not made with intent to oust the true owner. This was based upon an admission of the defendant at the trial when he said:

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1. **Powell v. McFarlane** [1979] 38 P. & C.R. 452, 469.
2. [1969] 2 A.C. 19; see also **Paradise Beach and Transportation Co. Ltd. v. Price-Robinson** [1968] A.C. 1072;
   Woodhouse v. Hooney [1915] 1 I.R. 296;
   Smirk v. Lyndale Developments Ltd. [1974] 2 All E.R. 8, 12;
   Muttunayagam v. Brito [1918] A.C. 895 at 900.

> "I would have paid rent on the land in dispute if anyone had come along. Nobody showed up. I didn't try very hard to find the owner. If somebody had come along I would either have taken a lease or got off the land. After I had been on the land for seven years I started claiming the land".

In the Privy Council it was said that an admission of this kind, which any candid squatter hoping in due course to acquire a possessory title would be almost bound to make, did not indicate an absence of the **animus possidendi** necessary to constitute adverse possession.

On the other hand, there is authority in the Court of Appeal and below which seems to require a squatter to intend to exclude the true owner before time can run in his favour.

This line of authorities has its origin in the judgment of Lindley M.R. in **Littledale v. Liverpool College**[3] where the land in dispute was a narrow grass strip open at both ends, situate between two fields belonging to the defendants and separated from them by hedges. The strip led from a public road to a pasture belonging to the plaintiffs. It was admitted that the defendants had a paper title to the strip and conceded that the plaintiffs were entitled to a right of way over the strip. More than twelve years before the commencement of the action the plaintiffs had erected a gate at each end of the strip which they had kept locked. But it was held that this did not dispossess the defendants, Lindley M.R. stating that:

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3. (1900) 1 Ch. 19, Romer L.J. agreeing.

> "They could not be dispossessed unless the plaintiffs obtained possession themselves; and possession by the plaintiffs involves an animus possidendi - i.e. an occupation with the intention of excluding the owner as well as other people".[4]

If the plaintiffs had been strangers, having no right to or over the strip in question, the natural inference would have been that they put up the gates in order to exclude everyone.[5] But the existence of the right of way suggested a different explanation. It suggested, and the Court found, that the gates were put up, not to exclude the defendants but to protect the plaintiffs right of way from invasion by the public.[6] The erection and locking of the gates did not therefore demonstrate the required **animus possidendi.** Accordingly, the plaintiffs had not acquired title to the disputed strip and their action was dismissed.

Lindley M.R.'s judgement in **Littledale v. Liverpool College** has been cited with approval and the decision followed in a number of subsequent cases.[7] The result is a formidable body of authority for the view that

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4. (1900) 1 Ch.19, 23. **Powell v. McFarlane** [1979] 38 P.& C.R. 452, 472/3. There is a similarity with the much criticised view, associated with Savigny, requiring **animus domini** for civil possession in Roman Law. "The work upon possession is Savigny's Das Recht des Besitzes. This essay is universally recognised as one of the most masterly that has ever appeared upon any branch of jurisprudence, and is deserving of the most careful perusal by the English student". (Lindley, "An introduction to the study of jurisprudence being a translation of the general part of Thibaut's System des Pandekten Rechts", Appendix, cxvi-cxvii; Maxwell, London, 1855). But no claims is made in this early work of Lord Lindley that English law followed the alleged Roman rule.
5. (1900) 1 Ch. 19, p.22.
6. Sir F.H. Jeune thought that the plaintiffs had a right to erect and lock the gates by virtue of their right of way. If so, it was a right existing only in the very special circumstances of the case, for such a right is not recognised as a general incident of a non-exclusive agricultural way.
7. **Philpot v. Bath** (1904) 20 T.L.R. 589; (1905) 21 T.L.R. 634; **Beaufort v. Aird** (1904) 20 T.L.R. 603; **Convey v. Regan** [1952] I.R. 56; **Williams Brothers Direct Supply Ltd. v. Raftery** [1958] 1 Q.B. 159; **Thomas V Ward Ltd. v. Alexander Bruce (Grays) Ltd.** [1959] 2 Lloyd's Rep. 472; **George Wimpey & Co. Ltd. v. Sohn** [1967] Ch. 487; **Hughes v. Griffin** [1969] 1 W.L.R. 23; **Tecbild Ltd. v. Chamberlain** [1969] 20 P.& C.R. 633; **Powell v. McFarlane** [1979] P.& C.R. 452; **Murphy v. Murphy** [1980] I.R. 183.

a squatter must demonstrate an intention to exclude the true owner if he is to acquire a possessory title. Nevertheless that view is inconsistent with the advice tendered by the Judicial Committee of the Privy Council in **Ocean Estates** and is not beyond challenge. The first problem must be to find a basis for the **Littledale** doctrine.

The basis of the Littledale doctrine

The present Limitation Act, like its predecessors,[8] does not expressly deal with the intention required to establish possession. None of its provisions expressly establishes the rule laid down by Lindley M.R.[9] The Statute itself does not, therefore, provide a direct answer. However, it is possible that the **Littledale** version of **animus possidendi** is implicitly required by the Act by virtue of it being part and parcel of the concept of possession used by the Act. To test this possibility it is necessary to consider whether the **Littledale** version of **animus possidendi** forms part of the law's general notion of possession of land, or alternatively, whether it could form part of a special concept of possession used only in the Limitation Acts.

Amimus possidendi in the general concept of possession

In **Littledale v. Liverpool College**, although noting that he had looked at all the decisions he could find which threw any light on the subject, Lindley M.R. did not cite any direct authority for his proposition that **animus possidendi** involves an intention to exclude the owner as well as other people. No such general authority appears to exist. Quite the reverse; the common law does **not** generally insist that a possessor of land must always have an unlimited intention to exclude the true owner.[10] For

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8. The Real Property Limitation Acts, 1833 and 1874, and the Limitation Acts 1939 to 1980.
9. In particular, the requirement in sch. 1, para. 8 for "adverse possession" before time will run, is not the basis of **Littledale.** "Adverse possession does not necessarily involve any element of hostility", Cairns L.J. in **Palfrey v. Palfrey**, Unrep., C.A., 5 Dec. 1973, Bar Lib. No. 416 A.
9. See e.g. Pollock and Wright, Possession, 17. Lightwood, Possession, 23. Holmes, The Common Law, 220; Pollock-Holmes letters, C.U.P. 1942, vol.1 p.8, 10.

example, "occupation with the intention of excluding the owner as well as others" will clearly not do as a definition of **animus possidendi** where the person in possession is in fact the owner,[11] or where he honestly but mistakenly believes himself to be the owner [12]and is ignorant of the existence of a rival title.

The meaning given to **animus possidendi** in the **Littledale** line of cases is not, then, the meaning which the common law invariably gives to those words. The usual meaning of **animus possidendi** at common law is in fact that adopted by the Privy Council in **Ocean Estates v. Pinder.**

A Special Concept of Possession?

But the **Littledale** intention might conceivably be a special condition which is **sometimes** required in order to establish possession. For it is generally recognised that "possession" is a legal concept of variable meaning, the word being used in different contexts with different meanings.[13] It might therefore be argued that "possession" has a special meaning in the law of adverse possession of land and the limitation of actions and that **animus possidendi**, in this context at least, bears the unique meaning given to it in the **Littledale** line of cases. However, the modern theory of the nature of title to land and the modern history of the law of limitation of actions undermine this argument.

As to modern theory, it is well established that possession[14] of land gives the possessor a title to that land as owner.[15] Possession does not,

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11. Cf. **Powell v. McFarlane** [1979] 38 P. & C.R. 452.
12. The Statute will nevertheless operate in such a case; **Palfrey v. Palfrey**, C.A. Unrep. 5 Dec. 1973, Bar Lib. No. 416A.
13. D.M. Walker, The Oxford Companion to Law - "Possession"
14. Or, formerly, seisin; Williams, Seisin, 7; Lightwood, Possession, 10; Megarry & Wade, 4th ed., 1005; **Leach v. Jay** (1878) 9 Ch. 42, 44.
15. Pollock and Wright, 22, 93-6;
    Lightwood, 122-6;
    Megarry & Wade, 1006.

however, give an **absolute** title - the common law knows nothing of absolute title[16] - but only gives a title which is relatively good,[17] that is to say, a title which is good and can be enforced only against those who cannot show an older title which has not been extinguished by limitation. Since possession only gives a relative title, a possessor cannot logically be required to have an unqualified intention to exclude the true owner as well as the rest of the world; at the most, a possessor might be required to have an intention to exclude all those who cannot show a title which is better than his own. To require anything more than this would be to require a possessor to intend to do something he cannot lawfully do and to have a right which is greater than any which is recognised by common law. But such an excessive intention does in fact appear to be demanded by the rule in **Littledale v. Liverpool College** which requires that a squatter must intend to exclude the owner as well as other people. The rule in **Littledale** appears, therefore, to be open to doubt as being inconsistent with the nature of title to land.

The recent history of the law of limitation of actions to recover land also casts serious doubt on the argument that <u>animus possidendi</u> bears the special meaning given to it in the **Littledale** line of cases. Before the passing of the Real Property Limitation Act 1833 time ran (under the Statute of James[18]) from the disseisin of the freeholder or ouster of a termor, or from the taking of an adverse possession.[19] At this period, an intention to disseise or to oust or to claim in opposition to a prior possessor seems to have been required to make time run.[20]

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16. **Ocean Estates v. Pinder** [1969] 2 A.C. 19, 24.
17. **Asher v. Whitlock** (1865) L.R. 1 Q.B. 1;
    Perry v. Clissold [1907] A.C. 73.
18. 21 Jac. 1, c. 16, discussed above, Chapter 3.
19. **Paradise Beach Co. Ltd. v. Price-Robinson** [1968] A.C. 1072;
    Hughes v. Griffin [1969] 1 W.L.R. 23.
20. **Jerritt v. Weare** [1817] 3 Price 575.

But the effect of the Act of 1833 was to abolish the old doctrine of adverse possession.[21] Thereafter, actual possession by one party, adverse or not, was sufficient,[22] the continued use of the phrase "adverse possession" being only as a convenient term for possession in favour of which time is running.[23]

The irresistible weight of authority favouring the sufficiency of actual possession after the Act of 1833 in fact points firmly against any suggestion that it is necessary to demonstrate an intention to exclude the true owner in order to establish possession. The abolition of the original doctrine of adverse possession could not have received such general judicial acceptance, without hint of qualification, if "possession" itself required an equivalent element of hostility. The recent history of the law of limitation therefore also casts doubt on the **Littledale** doctrine.

The doctrine is also open to criticism on the merits.

The merits of the Littledale doctrine

The **Littledale** rule can be criticized on the grounds that such assistance or protection as the rule gives to an owner is artificial and that the rule actually gives no additional protection to owners in the type of case in which the rule is best established.

So far as concerns the criticism of artificiality, the rule may in some cases make it more difficult for a squatter to take advantage of the Limitation Act 1980. But this seems to be its only purpose, since the fact that a squatter happens to have the **Littledale** animus does not necessarily give the owner of the land any better or clearer warning of that squatter's

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21. **Nepean v. Doe** (1837) 2 M. & W. 894; Chapter 5, above.
22. **Culley v. Taylerson**, supra;
    Paradise Beach Co. Ltd. v. Price Robinson, supra.
23. **Ely v. Bliss**, (1852) 2 De G.M. & G. 459;
    Hughes v. Griffin, supra.

presence than he would have if the squatter only had the intention approved in **Ocean Estates v. Pinder.** The **Littledale** rule does not require the squatter to physically eject or bar the owner. It does not even insist that the squatter must always inform the owner that he intends to exclude him.[24] In fact, **Littledale** does not require the squatter to do anything more on the land than is required under the **Ocean Estates** rule.

The acts which have been held sufficient to demonstrate the **Littledale** animus[25] - ploughing and cultivating agricultural land; fencing; warning-off trespassers; locking or blocking the only means of access - - might equally well be done by a person who has only the bare intention to possess approved in **Ocean Estates v. Pinder.** It appears, therefore, that the degree of exclusive control over land which is necessary for a possessor to demonstrate and the means by which he may do so are in general the same, whether the court prefers to follow **Littledale v. Liverpool College** or **Ocean Estates v. Pinder** on the meaning of animus possidendi.

For these reasons, **Littledale v. Liverpool College** seems to be an artificial obstacle; it appears to require little more than a private intention to do something which a squatter is not actually required to attempt and which, in most cases, he could not in fact lawfully or practicably do.

It might also be doubted whether the **Littledale** rules gives owners greater protection in the precise class of case in which the rule is best established. **Littledale v. Liverpool College,** and most of the subsequent decisions, have involved the question whether the possession has been established by acts which might have been either acts of possession, or which

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24. **Rains v. Buxton** (1880) 14 Ch. D. 537. Cf. **Powell v. McFarlane** [1979] 38 P. & C.R. 452, 480: where the claimant's use of the land does not demonstrate the required intention, a contemporary declaration of it will be of little value unless brought to the owner's attention.
25. See the list in **Powell v. Mcfarlane,** Supra, at 478.

might have been done in the assertion of some lesser right such as an easement or a profit a prendre. It is submitted that this type of case can be resolved without requiring the claimant to show an unqualified intention to exclude the true owner. For example, it is submitted that the Court in **Littledale** might, on the facts, have reached the same decision without requiring the plaintiff to show an unqualified intention to exclude the owner as well as the rest of the world. It would have been sufficient ground for the decision to find (as Lindley M.R. did)[26] that the plaintiff's acts had been done to protect his right of way, rather than to take possession. The plaintiff's claim could then have been dismissed on the ground that he had not proved that he had even a bare intention to possess at the relevant time and that consequently he had not been in possession.[27] It appears, therefore, that the **Littledale** rule does not invariably give an owner greater protection than the rule in **Ocean Estates v. Pinder.**

The **Littledale** doctrine might possibly also be criticised for being inconsistent with a specific policy of the law of limitation of actions to recover land, which is to secure ease of transfer of interests in land. The law seeks to achieve this aim by requiring a purchaser (subject to agreement to the contrary) to be satisfied as to the ownership of unregistered land which he has agreed to purchase by proof of title to that land over only a relatively short period and by guaranteeing that any outstanding claims to the land will in all probability have been barred by long possession under the vendor's title. Possibly, therefore, the **Littledale** doctrine could be criticised for introducing uncertainty in title by making possession (and (and hence the operation of the Limitation Act) depend on will-o-the-wisp

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26. [1900] 1 Ch. 19, 22, 23.
27. Most of the decisions following **Littledale** cited in note 7 (above) could also be supported on the ground that **animus possidendi**, in the **Ocean Estates** sense, had not been shown.

private intention. In practice, however, the **Littledale** rule does not seem to have resulted in widespread uncertainty. There may be several reasons for this.

First, it is not common to find a person who wishes to assert that he is in adverse possession but who does not claim an intention to own. Second, in some cases, the absence of the **Littledale** intention may go undetected unless there is either a candid squatter (as in Ocean Estates) or the prior owner is in the fortunate position of being able to prove that the intruding claimant lacks the required intention - this is not an easy task where the claimant asserts that he had the necessary intention and can point to substantial acts of use or enjoyment of the land. It is also a task which becomes progressively more difficult with the passage of time. Third, the **Littledale** doctrine is unlikely in any event to cause hardship to purchasers at arms length. If a would-be squatter does not intend to own, he is, of course, unlikely to attempt to sell. It is possible, however, that over a period of years, an intruder with only a bare intention to possess might harden his intention into a claim of ownership - in such a case the squatter might then try to sell and might be tempted to conceal his own earlier lack of animus possidendi. But in most cases, the absence of a paper title should be adequate warning to a purchaser that he must insist on strict proof of all the elements required to establish possession. In practice, it seems that the **Littledale** rule does not lead to uncertainty in title; there is no evidence that it causes hardship to third parties.

However, unprincipled and unmeritorious though the decision in **Littledale v. Liverpool College** appears to be it would nevertheless be premature to draw any conclusions without first considering whether **Littledale** is capable of bearing, and would be more acceptable by, an interpretation which was suggested by Slade J. in **Powell v. McFarlane.**

A restrictive interpretation of **Littledale**?

In **Powell v. McFarlane** Slade J. re-interpreted Lord Lindley's original dictum, saying:

> "animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as reasonably practicable and so far as the processes of the law will allow".[28]

But the qualification which is introduced by the words underlined in the second part of the statement is troubling. It is open to two objections. First, the requirement of even a qualified intention to exclude the true owner is inconsistent with the advice of the Privy Council in **Ocean Estates.** Second, the basis for qualifying the **Littledale** principle by adding the words "so far as the processes of the law will allow" is obscure, for the processes of the law do not appear to allow a possessor to exclude a prior owner at all.

The explanation for the words of qualification seems to be Slade J.'s view that a possessor has:

> "one valuable element of protection even against the owner himself. Until the possession of land has actually passed to the trespasser the owner may exercise the remedy of self-help against him. Once possession has passed to the trespasser, this remedy is not available to the owner, so that the intruder's position becomes that much more secure; it he will not then leave voluntarily, the owner will find himself obliged to bring proceedings for possession and for this purpose to prove his title.[29]

It is true that at the date on which Slade J.'s judgment was delivered,[30] in many cases a well-advised owner would choose to commence proceedings rather than to exercise his right of entry against the person in possession. But the reason was not that the owner's right of entry ceased to exist

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28. [1979] 38 P. & C.R. 452, 471/2. Italics supplied.
29. [1979] 38 P. & C.R. 452, 476; cf. **Morris v. Tarrant** [1971] 2 Q.B. 143, 159.
30. The Criminal Law Act 1977 became law between the date of judgment and report.

or ceased to be exercisable on possession being taken, leaving the owner with only a right of action;[31] quite the reverse is true, for the right of action is subsidiary to the right of entry[32] and both only arise when the adverse possession is taken. The real reason for commencing proceedings to recover possession rather than relying on self-help was that in circumstances where violence appeared likely, many owners were disinclined to run the risk of committing a criminal offence, in particular the offence of forcible entry, in the process of ejecting a squatter. The continued possession of a squatter in such circumstances cannot therefore be described satisfactorily as being "allowed" by the processes of the law. On the contrary, such continued possession is condemned by the law in damages; an interlocutory injunction may be obtained to terminate it;[33] summary procedures exist by which an order for possession may be obtained and before the Criminal Law Act 1977 became law, such conduct on the part of the squatter might amount to an indictable conspiracy or to a forcible detainer if force was used to prevent or deter the true owner from recovering possession.[34] In these circumstances it cannot possibly be the case that to possess, a person is first required to intend to drive the owner to action and to take advantage of the delay caused by the law's need to proceed with some deliberation.

In any event, it might be thought wrong in principle to trim a general concept of possession under English law[35] so as to make it consistent with a criminal offence relevant only in limited circumstances. With benefit

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31. **Hemming v. The Stoke Poges Golf Club Ltd.** [1920] 1 K.B. 720.
32. **Magdalen Hospital v. Knotts** (1878) 8 Ch. D. 709, 727.
33. **Manchester Corp v. Connelly** [1970] Ch. 420, C.A.
34. **R v. Robinson** [1971] 1 Q.B. 156.
35. The decision in **Powell v. McFarlane** was expressly founded on a general doctrine of possession. [1979] 38 P. & C.R. 452, 469.

of hindsight, the Crimminal Law Act 1977 has demonstrated the disadvantage of such reasoning because it has repealed the offences of forcible entry and detainer and substituted new offences which do not necessarily depend on the squatter having taken possession. Ironically, the new offences created by the 1977 Act do not apply at all in a case like **Powell v. McFarlane** where the land in dispute was a field, since the Act only applies to "premises". Land is not "premises" unless ancillary to a building.

In view of these difficulties, it is not thought that the intention apparently required by the Court of Appeal in **Littledale v. Liverpool College** can be qualified in the way suggested in **Powell v. Mcfarlane.** It is respectfully submitted that **Littledale** must stand or fall in its original and unvarnished state.

Conclusion

The rule in **Littledale v. Liverpool College** is well established and has never been seriously questioned. Nevertheless, if **Littledale** is to be considered as a general rule, it is difficult to find adequate ground to support it. The rule is inconsistent with **Ocean Estates v. Pinder.** It lacks both merit and a sound theoretical basis and artificially strains the legislation. Its most important effect seems to be to confuse and unnecessarily complicate a difficult area of law. It is respectfully submitted that the approach of the Privy Council in **Ocean Estates v. Pinder** ought now to be preferred in English Courts.

Possession - Conclusions

It was suggested in the introduction to this Chapter that the concept of possession is central to any study of the operation of the Statute of Limitations. Possession is the event which starts time running. An examination of possession is therefore crucial if an attempt is to be made to estimate whether the statute is properly and fairly adapted to achieve its objectives.

In this thesis, it has been accepted (Chapter 4) that, in general, the ideal point from which time should be made to run is an event which:

a. is sufficiently near in time to the incident giving rise to the claim to ensure that proceedings are instituted before the relevant evidence becomes either unobtainable or stale;

b. is unmistakable and readily ascertainable; and

c. necessarily becomes known to the plaintiff forthwith.

Does the taking of possession satisfy these tests? In general, it seems that it does.

The taking of an independent possession will itself constitute a cause of action so far as present interests in land are concerned. So at least in theory, it is possible to institute proceedings to recover possession of a present interest in land before any real risk of staleness has arisen.

Taking possession is also normally "unmistakable and readily ascertainable". In many, perhaps most cases, it is readily apparent to anyone who inspects the land. In such cases, the existence of the cause of action will therefore necessarily come to the notice of an owner as soon as he looks at the land.

In general, therefore, possession is a suitable **terminus a quo**.

However, as the words of qualification in the two preceeding paragraphs indicate, possession is not always a state of affairs which is actually ascertained without mistake. Possession is, in consequence, not always

a perfect point of departure from the perspective of either plaintiff or defendant. To estimate whether, in relying on the concept of possession, the statute is properly and fairly adapted to achieve its objectives, the difficulties mentioned earlier in this chapter to which the idea of possession is subject, must now be examined from the point of view of the person against whom time is running. The difficulties must then also be considered in relation to each of the three major objectives of the statute.

From the point of view of a time-barred owner, the statute clearly does **not** provide fool-proof protection.

It was pointed out in Chapter 4 (above) that the statute does not demand that an owner shall know of his rights before time can run. If there were such a requirement, possibly some unfairness would be avoided. But the case for such a rule has been consistently rejected on the grounds that it would involve much uncertainty, and that cases in which a plaintiff is unaware of his claim are in fact comparatively rare.

The general assumptions seem to have been that (a) if a squatter takes adverse possession, then his intrusion will be discovered if the owner looks at the land; and (b) that it is not unreasonable to expect an owner to look at his land once in 12 years.

Are these assumptions correct? If an owner looks, will he invariably discover the presence of an adverse possessor?

The general answer would seem to be that in most cases he will. Possession is probably most easily discovered when the **locus in quo** is a whole building. If, for example, a squatter has taken possession of a dwelling house, the possession will be clearly apparent on inspection. But even in the case of other types of land, an independent possession may be equally obvious. If a farmer has entered a field adjoining his farm and cultivated it in the normal fashion, his possession will be discoverable on inspection at any time of the year, and notwithstanding that the farmer

does not happen to be in the field at the moment inspection takes place.

However, there may equally be cases in which possession cannot be so easily discovered. In one or two instances, it may be impossible to discover possession by any reasonable means - typically in the case of subterranean trespass to minerals, but also to cellars and tunnels. But in other instances, discovery, although not impossible, might be difficult. To establish possession, it is not necessary that a squatter should be permanently present on the spot. The nature of the acts required depends on the nature of the property and may certainly be of a more or less discontinuous nature. Occasionally, therefore, the nature of a particular property might be such that a possessor might reasonably be expected to go on it, use it, or take things from it only on isolated occasions. Possession may not therefore always be immediately obvious where the land is small and is of limited use, or even where the plot is larger, but of very low or no economic value. In such cases, it is possible that an owner might not be aware that another was making regular use of his property. The examples cited above of possession established by taking sand from the seashore, or by shooting over a swamp probably fall into this category.

Nevertheless, it is unlikely that circumstances will frequently occur in which 12 years' possession can be established by acts of user or exclusion which were unknown to a reasonably prudent owner, who was familiar with the property and aware of his rights and who looked at the land. The reason is that if the acts of user by an intruder are such that they are unlikely to come to the notice of a reasonably prudent owner present in the locality, they will be unlikely to be of the necessary nature, duration or intensity to amount to possession. As the Law Reform Committee pointed out:[36]

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36. 21st Report, Cmnd. 6923, para. 349

> "the courts - in our view rightly - have never been astute to find that possession has in fact been taken. This approach has been particularly marked in relation to small pieces of land which cannot be economically exploited - for example, a narrow strip ultimately intended as an access road - and for which the owner had no immediate use. None of us would wish to detract from the necessity of jealous scrutiny of acts alleged to have resulted in possession being taken of such a parcel of land. Thus what have happily been called "trivial" acts of trespass, even if repeated over many years, have never been equated with the acquisition of possession".

The result, it is suggested, is that where a squatter's acts are of such a limited nature, duration or intensity that they are unlikely to come to the notice of a reasonably prudent owner, they are unlikely to be held by the court to amount to possession of the land.

But whilst acts of user by an intruder sufficient to establish adverse possession will almost invariably come to an owner's attention, will owners always correctly interpret these acts as threats to title? A number of points must be made here.

First, even when an owner is aware that another is in possession, he may still not realize that the possession is adverse and that time is running. The most obvious cases here are those in which time runs in favour of a tenant, mortgagee, trustee or beneficiary. Those special cases are dealt with in the course of the three following chapters.

Second, whilst it is true that a lack of a precise test for distinguishing possession can lead to uncertainty, this difficulty will rarely prejudice owners. So far as an owner is concerned, any unauthorised user of the property will be a trespass. If, therefore, the owner is aware of any continuing interference whatsoever, he will usually be sufficiently warned and so in a position to protect his own interests. In such cases, uncertainty whether an intruder's acts do or do not amount to possession will not normally be significant. The difficulty in, e.g. distinguishing acts of possession from those which might have been done in the assertion of an easement probably, then, ought not to be regarded as a significant problem.

It is course true that an owner might be prepared to informally acquiesce in the establishment of an easement (or to accept that he is unable to prevent an occasional traspass), but not willing to consent to his own dispossession. There is consequently a rather remote danger that an owner might misunderstand the nature of ambiguous acts of user and inadvertently fail to object to his own dispossession. But the need for a squatter to have and probably to demonstrate **animus possidendi** (if not the intent to dispossess demanded in **Littledale v. Liverpool College**) is some protection for ownership. It is not perfect protection - for a squatter may be able to demonstrate **animus** otherwise than by acts done on the land, e.g. by reference to the squatter's own paper title. Nevertheless, it is suggested that this particularly theoretical danger to owners is so small that it is of no real importance.

The third and final point to be made in relation to correct interpretation of an intruder's acts, is that an owner may not need to interpret in any event. The rule that possession must be exclusive is considerable protection to an owner. While an owner uses his own land, with intent to possess it, no-one else can ever establish possession, without either actually or constructively ejecting him. In any such case, an owner will necessarily be sufficiently warned of a threat to his title.

It therefore seems reasonable to conclude that the assumption that an owner will be able to discover a threat to his title if he inspects his land, is generally correct. But what of the second assumption on which the present law is based?

The second general assumption on which the current legislation seems to be based is that an owner can reasonably be expected to be astute to protect his own interests; that this involves - at the least - keeping an eye on unused land and that the minimum limitation period of 12 years is sufficient time to enable owners to inspect.

There is little that can be said in relation this assumption at this point, save that the value judgment which it embodies seems to be generally accepted. However, two possible exceptions to the correctness of the general judgment ought to be mentioned. First, the assumption is quite clearly inapplicable in the case of an innocent owner who is ignorant of his title. However, experience suggests that it is a highly unusual cases in which an owner is, without fault on his part, ignorant of the existence or the extent of his property. The hardship caused in the rare case in which this does occur, and in which adverse possession is then taken of the property, is probably far outweighed by the practical merits of the statute.

The second exceptional case in which an owner cannot reasonably be expected to protect himself is where he is in fact unable to protect himself. Quite clearly, it would be wrong in general to expect an owner to do something which he was incapable of doing.

But in precisely those cases in which an owner has the best of reasons for not looking after his own property - cases of disability - the statute contains exceptions and extensions designed to avoid or mitigate possible hardship. Disability is dealt with in greater detail in Chapter 12, below. It ought perhaps, to be noted here, however, that the boundaries of disability are confined to cases of infancy and mental illness; it is possible, therefore, that other forms of physical infirmity might prevent effective assertion of rights. Clearly there would be unfairness in depriving any owner of this title in circumstances in which he had been unable effectively to protect himself. This problem was considered, briefly, by the Law Reform Committee in their 21st Report. The Committee noted two objections to any extension of the idea of disability. First, it would be difficult to draw an effective and precise line between forms of physical

illness which could be treated as creating disability and those which could not. Second, that in particular in those forms of litigation involving title to property, a suspension of the running of time by virtue of a plaintiff's physical incapacity could cause considerable hardship to a defendant. To these two points, perhaps a third might be added. At least in the field of title to land, there is little or no evidence which suggests that great hardship is caused by the absence of old age or physical incapacity as a suspending factor. In these circumstances, with respect, the Law Reform Committee's judgment seems well-founded. The possibility of hardship in a few unusual cases would seem to be overborne by the practical advantages of the statute.

It is to an examination of possession in relation to those advantages that attention must now be turned.

In the opening chapters of this thesis it was suggested that the objectives of the statute include the avoidance of stale claims and of hardship, as well as the desire to simplify, expedite and reduce the cost of investigation of unregistered titles. It is now necessary to measure the idea of possession around which the statute is constructed against these objectives. Does the test of possession promote the objectives of the Statute?

The answer would seem to be that in general it does. However, one or two words of qualification are necessary. A limitation period based on adverse possession does not guarantee that stale claims can never succeed or that the statute can always fulfil its other objectives. There are a number of reasons for this.

First, possession is itself a slippery concept. In certain areas, the rules of law are not clear - for example, the rule (discussed above) relating to acts done only on one part of an "entire whole"; the doubtful rules in **Leigh v. Jack** and **Littledale v. Liverpool College** are also excellent examples of this type of uncertainty. The direct effect of this first defect in the statute's idea of possession is of course greater where the statute's

objectives of avoiding stale claims and unfairness are concerned. None of the doubtful rules mentioned above have any effect in preventing the statute fulfilling its aim of simplifying conveyancing. For, almost by definition, a purchaser who has investigated an apparently sound paper title will be able to demonstrate an intent to own; he will never, therefore, fall foul of the rule **Littledale v. Liverpool.** Nor will he be prejudiced by uncertainty about the ambit of the 'entire whole' rule; for there is little doubt that that rule does apply in favour of anyone claiming under an apparently regular paper title. In the result, uncertainty in some of the rules of possession will not directly prevent the statute achieving the conveyancing objectives. Nevertheless, this type of uncertainty does carry with it an **indirect** threat to the ability of the statute to achieve **any** of its three objectives. Uncertainty in any of the rules - undesirable though it is in its own right - also carries with it the further danger that the uncertainty will be exploited. Hard cases in which an owner appears to be threatened with deprivation of property by an unmeritorious limitation defence seem occasionally to have tempted counsel and the courts to exploit the uncertainties and strain the law in order to avoid a plea of the statute. The decision in **Wallis's** and **Hyde v. Pearce** (both discussed above) seem, with respect, to be examples of this process at work. This is a dangerous course. The first case, when decided, represented a major threat to the statute. It was pointed out (above) that in this instance the legislature acted promptly to remove the threat. But the more recent case of **Hyde v. Pearce** is an equally unacceptable development which is, as yet, unchecked.

It seems to the writer that the dangers which can result from judicial manipulation of the concept of possession ought not to be underestimated. This was, after all, one of the major reasons why the law came to be in such a sorry state in the years before the enactment of the R.P.L.A. 1833; the judicial invention and the grafting on to the Statute of James

(21 Jac.1, c.27) of the doctrine of non-adverse possession spoilt that statute. It seems to the writer that there is a risk that - in this context - history will repeat itself.

However, serious though this risk is, it is not the only way in which the slippery nature of the idea of possession can hinder or prevent the statute achieving its objectives. A second reason is that possession is not always an easy idea to apply to known facts. The degree of user or control necessary to demonstrate possession of land cannot be precisely fixed, for it must relate to the nature of the land in question. But the lack of a precise test for identifying possession inevitably introduces a degree of uncertainty into the law. And if apparently conflicting decisions on similar facts are reported (as they are) the inherent uncertainty of the concept is compounded.

Particularly difficult problems can arise in deciding whether the proof of particular acts establishes possession when the acts in question might have been done either as acts of possession or in the assertion of some lesser right such as an easement. The overlap between 'easement' and 'possession' is large enough to give rise to difficult decisions and to lead to uncertainty.

The result of all this is that an element of unpredictability is introduced into the law with the result that the operation of the statute is not always "unmistakable and readily ascertainable".

Here again, however, the difficulties to which the idea of possession can give rise do not affect the ability of the statute to achieve all of its objectives. The element of unpredictability probably limits the efficacy of the statute to an appreciable extent only so far as concerns the avoidance of stale claims and of hardship. So far as the Statute's third objective is concerned - simplification of investigation of title - little damage is done by the uncertainty as to the precise degree of control or user necessary to establish possession, or by the problems which may arise in deter-

mining whether particular acts done on land are acts of possession or merely acts asserting some lesser right. The reason is that the existence of the paper title under investigation will, normally, conclusively demonstrate the necessary **animus possidendi.** And the **animus** will colour any ambiguous acts as acts of possession.

In practice, therefore, the problems mentioned above only affect the ability of the Statute to achieve its aims of avoidance of stale claims and of hardship to long possession.

Finally, at this point, it must be noted that there is also a third reason why a limitation rule based on possession cannot guarantee that stale claims can never succeed. The reason is that evidence of possession can itself become stale. Many of the decided cases mentioned in this chapter demonstrate that it can be difficult, if not impossible, years after the event, to decide who did what, where, when, and with what motive.

However, it is at first blush curious, although none the less true, that the difficulty (which increases with passage of time) of finding evidence to demonstrate possession, does not in fact affect the ability of the Statute to achieve its third objective, which is to operate as a guarantee of security of title in unregistered conveyancing. A brief digression is necessary here to explain why this is so.

It has been suggested in this thesis that the statute aims to facilitate conveyancing by guaranteeing that a title investigated only for a limited period is nevertheless practically secure against any older, concealed ownership. In this way, the legislation attempts to simplify and expedite conveyancing.

It might be thought that conveyancing practice would therefore be directed to three separate issues. First, to tracing the development of the paper title for the necessary period. Second, to examining the current possession of the land. And third, to tracing the history of the possession

for at least the minimum statutory period. Now at first sight, conveyancing practice appears to deal rigorously only with the first issue. If this were in fact the case, it would tend to suggest that purchasers, paying no attention to possession or its history, place no reliance on the Statute as a guarantee of security of title and that the statute is therefore redundant so far at least as this objective is concerned. But here again, first appearances may be misleading.

So far as scrutiny of current possession on a sale etc., is concerned, it is there true that it is neither the invariable nor the common practice of conveyancers to attempt to discover who is in actual possession by personal inspection of the property. There are of course some - albeit unusual - circumstances in which the need for a personal inspection is generally conceded. For example, it is the duty of a purchaser's solicitor to satisfy himself as to identity; viz. that the property referred to in the paper title is the same as that which his client wishes to buy on the ground. Nevertheless, this does not inevitably, or even generally, require a personal inspection.[37]

But the usual absence of personal inspection by conveyancers does not mean that current possession is wholly disregarded.

The predominant view amongst conveyancers is that it is normally for the purchaser himself or his other professional agents (where necessary, with benefit of advice) to inspect the property to discover who is in actual possession.[38] So much for possession at the moment that a title is investigated. But what of the previous history of that possession? For to satisfy the statute, the possession must have lasted for at least 12 years.

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37. Law Society's Digest, opinion no. 127.
38. See Elphinstone (conveyancing counsel to the court), evidence to the Royal Commission on the Land Transfer Acts.

Here again, the usual practice amongst conveyancers appears at first sight to ignore the question of possession. A conveyancer, in the normal case, examining an apparently regular paper title does not direct his attention at all to questions of who did what on the land, and when and with what intention, in an attempt to discover who might be said to have been in possession for the last 12 years.

Such a process would be adopted only if the paper title was defective - i.e. where the title was known or seriously suspected to be possessory in origin. It might also be adopted at the margins of a regular title, if boundaries were uncertain.

In other cases, attention is confined to the development of the paper title, not to that of the actual possession.

However, all this is not to say that possession is irrelevant to the conveyancer, or that the statute is a guarantee upon which no weight is ever placed in investigation of titles. For the heart of the matter is that, indirectly, scrutiny of the paper title does afford evidence of the history of a possession. As Professor Farrand succintly points out [39]

> "what is shown (by a paper title) essentially are certain successive acts of ownership, i.e. dispositions of the land, during the selected period : these acts imply possession (or seisin) throughout that period".

In other words, acts of ownership effecting dispositions are evidence of seisin and nowadays probably also possession.[40] The events dealt with

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39. Contract and Conveyance, 3rd, 92.
40. **Welcome v. Upton** (1840) 6 M.& W. 536, 542; **Re Gilbert and Foster's Contract** (1935) 52 T.L.R. 4; **Johnston v. O'Neill** [1911] A.C. 552, 569, H.L.; **Magdallen v. Knotts** [1878] 8 Ch.D. 709, 724, C.A.; **Bristow v. Cormican** (1878) 3 App. Cas. 641, H.C.; **Wuta-Ofei v. Danquah** [1961] 1 W.L.R. 1238; **Fowley Marine v. Gafford** [1968] 2 Q.B. 618; **Ocean Estates v. Pinder** [1969] 2 A.C. 19.

in the paper title, therefore, will in general tend to demonstrate either seisin or possession of the vendor (or his predecessors) throughout the statutory period. The general tendency of the paper title may also be buttressed in particular cases by the following paper evidence of possession:

(a) ancient documents (documents 20 years old) produced from proper custody, and by which any right of property purports to have been exercised, are undoubtedly admissible to prove ancient possession. To the extent, therefore, that there may still be any distinction between seisin and possession as the basis of title to land or between the means by which either may be proved by documents (ancient documents admissible to prove possession, modern documents originally admissible only to prove seisin) at least so far as title deeds are ancient, as they frequently are, the paper title will undoubtedly tend to prove possession;

(b) by virtue of section 45 (6) L.P.A. 1925, recitals contained in a deed 20 years old at the date of contract are sufficient evidence of their own truth. Consequently, the ubiquitous recital in conveyances on sale of the vendor's seisin or possession is therefore sufficient evidence of seisin/possession at that time;

(c) it is presumed when land has been conveyed to a person, that thereafter he continued seised until such time as the contrary is proved or ought to be presumed.[41]

It is submitted that evidence of this type is, for practical purposes, sufficient for a conveyancer to be able to judge with a tolerable degree of certainty whether a vendor's title could, if need be, be protected by a plea of limitation against a claim to ownership by a third party. The reason is that if there is evidence (from the paper title) that the vendor

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41. **Magdallen Hospital v. Knotts,** cited above. **Whitford v. Gowling** [1974] 28 P. + C.R. 386.

(or his predecessors) have been seised or possessed during the statutory period, and the vendor is now in undisputed actual possession, then there is the very greatest likelihood that the vendor in question could rely on the statute if his title were called into question; and there is almost no risk at all that anyone else could rely on the Statute as against the vendor. For in either case, if the vendor at the moment of investigation of title is in actual possession or in receipt of rents, and there is an apparently regular paper title suggesting that his possession (or that the persons through whom he claims) began at a date more than 12 years ago, it is scarcely conceivable that some independent third party with a better title might have been in possession at some time during that period, but has now gone out of possession. For this to have occurred, it is necessary to imagine either that the paper title has been fabricated, or that it was not acted upon, or that some third party with an older title retook possession during the period of the proper title but was thereafter somehow persuaded to leave again or was dispossessed a second time; or finally, that a squatter took possession and established a title to the land, but again thereafter either abandoned the land, or was forced or persuaded to go. There will be few circumstancs in which any of these bare possibilities will be at all realistic when one finds an undisputed actual possession and an apparently regular paper title supporting and explaining it.

It is therefore suggested that it would be quite wrong to imagine that the devolution of a paper title and the history of the actual possession of the land dealt with in that title, are always quite distinct topics. In fact, they are inevitably closely intertwined. To conclude this digression on the significance of investigation of title, it is submitted that the fact that evidence of actual possession can become stale does not prevent the Statute acheiving its conveyancing objectives. The paper title, couplied with evidence of actual possession, actually forms a reliable basis on which

the history of the possession - and so the applicability of the Statute - can be judged.

Summary

The appropriate general conclusion to this chapter would seem to be that the Statute's reliance on the idea of possession does not prevent the law achieving its objectives. But the problems to which the notion of possession gives rise do limit the ability of the Act to achieve those objectives. In certain areas, the rules of law are not clear. In other instances, the rules are difficult to apply. The result is that an element of unpredictability exists. The operation of the statute is not always completely "unmistakable and readily ascertainable". Nevertheless, the slight inhibiting effect produced by the slippery nature of the concept, does not directly affect the third objective of the legislation identified in this thesis, which is the simplification of investigation of unregistered titles. So far as this objective is concerned, possession seems to be an entirely suitable **terminus a quo**.

CHAPTER 8

LANDLORD AND TENANT

This chapter is divided into 3 sections. The first section summarizes the law as it now stands. The second section examines the policies underlying the legal rules. The third section deals with the special subject of the law relating to tenants encroachments.

A. The Law

Where land is let to a tenant, the Statute may operate in favour of the landlord, of the tenant, or of a stranger.[1]

The first case does not seem to give rise to great problems. If the tenant does not enter under the lease, time will run against him; as it also will if the landlord enters wrongfully during the continuance of the lease.[2] But the running of time in favour of a tenant or a stranger requires greater attention.

1. In favour of a tenant

(a) General

In general, during the subsistence of a tenancy, the landlord is regarded for limitation purposes as having a future rather than a present interest in the land.[3] Until his reversion falls into possession on the determination of the lease (and with one important exception, below) the landlord's right

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1. Lightwood, Time Limits, 96.
2. **Incorporated Society v. Richards** (1841) 1 Dr. & War. 258;
3. **Doe v. Oxenham** (1840) 7 M. & W. 131;
   Doe v. Gopsall (1840) 114 E.R. 1025;
   St. Marylebone v. Fairweather [1963] A.C. 510, at 537 (Lord Radcliffe).

of action to recover the land from his tenant does not accrue and so time does not run.[4] This rule holds good whether the tenant is entitled to a lease at law or in equity.[5]

Until the determination of a tenancy, the landlord is therefore generally protected against a plea of limitation by his tenant. For a tenant in possession cannot normally alter the relation in which he stands to his landlord[6] and so cannot cause time to run during the subsistence of the lease. Thus:

(i) Mere non-payment of rent, for whatever length of time, under a term of years or a periodic tenancy in writing, will not bar the landlord's right to recover possession at the end of the lease.[7]

(ii) Failure to re-enter for a breach of condition or covenant giving rise to a right of re-entry will not prejudice the landlord's quite separate right to recover when the lease expires.[8]

As one example of this principle, a "disclaimer" or denial by the lessee of the lessor's title may (at most) be a ground of forfeiture.[9] But such a disclaimer will not in itself make time run against the lessor's[10] reversion.

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4. **Doe v. Oxenham**, above;
   Chadwick v. Broadwood (1840) 3 Beav. 308;
   Real Property Commissioners, First Report, 47;
   Lightwood, Time Limits, 96.
5. **Archbold v. Scully** (1861) 9 H.L.C. 360;
   Drummond v. Sant (1871) L.R. 6 Q.B. 763;
   Warren v. Murray [1894] 2 Q.B. 648 C.A.;
   Moses v. Lovegrove [1952] 2 Q.B. 533.
6. **Archbold v. Scully**, above.
7. **Doe v. Oxenham**, above;
   Chadwick v. Broadwood, above
   Re Turner's Estate (1861) 11 Ir.Ch.Rep. 304;
   Barratt v. Richardson [1930] 1 K.B. 686.
   However, this may be a fact from which a determination of the tenancy can be presumed: **Stagg v. Wyatt** 2 Jur. 892.
8. L.A. 1980, sched. 1, para. 7(2).
9. **Doe v. Flynn** (1834) 1 C.M & R. 137;
   Kisch v. Hawes (1935) Ch. 102;
   Wisbech St. Mary v. Lilley [1956] 1 W.L.R. 121;
   Warner v. Sampson [1959] 1 Q.B. 297.
10. **Archbold v. Scully**, above.

(iii) A landlord may also be protected by estoppel. A tenant is estopped from disputing the subsistance and validity of an estate in his landlord, as at the date of the demise.[11]

It might therefore be concluded that a landlord of land held under a term of years or a periodic tenancy in writing is insulated against the operation of the Statute in favour of a tenant until the lease comes to an end. However, special provision is made for certain periodic tenancies, which put landlords in a much less advantageous position.[12]

(b) Periodic Tenancies

In the case of period tenancies without any lease in writing, the landlord's right of entry is deemed to have accrued at the end of the first year, or at the last receipt of rent, whichever date is later:

> "(1) ... a tenancy from year to year or other period, without a lease in writing, shall for the purposes of this Act be treated as determining at the expiration of the first year or other period; and accordingly the right to action of the person entitled to the land subject to the tenancy shall be treated as having accrued at the date on which in accordance with this sub-paragraph the tenancy is determined.
>
> (2) ... Where any rent has subsequently been received in respect of the tenancy, the right of action shall be treated as having accrued on the date of the last receipt of rent".[13]

These provisions give rise to a deemed determination of the tenancy and a deemed accrual of cause of action. They are wholly artificial.[14] That is to say, the periodic tenancy actually continues and may have effect in certain circumstances[15] but nevertheless, time is running against the landlord.

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11. Spencer Bower & Turner, Estoppel 3rd ed., 198; **Industrial Properties (Barton Hill) Ltd. v A.E.I.** [1977] 2 All E.R. 293.
12. Before 1st August 1980 special provision was also made in the case of tenancies at will; see Chapter 6, above.
13. L.A. 1980, sched. 1, para. 5.
14. **Jessamine v. Schwartz** [1977] 2 W.L.R. 145.
15. See e.g. **Moses v. Lovegrove**, above; **Jessamine v. Schwartz**, above.

2. In favour of a stranger

(a) Against lessee. The definition of "land" in the Limitation Act 1980, section 38 (1) includes terms of years. Accordingly time will run against a lessee's right to recover possession from a stranger on the same basis that time will run against any other present interest in land.

(b) Against lessor. Time does not normally run against a lessor (exceptions considered below) until the determination of the lease.[16] It was explained (above) that for the purposes of the Statute, the landlord is generally treated as having a future rather than a present interest in the land. And under the general scheme of the Act, time does not run against future interests until they become estates or interests in possession, e.g., in the case of a reversion on a term of years, until the date of determination of the lease. The rule is straightforward. What is not quite so straightforward is the question of when a lease may be determined.[17]

(i) Termination of lease before tenant barred by stranger.

It is conceded on all sides that a lease can be determined by any appropriate method before time has finally run against a tenant. However, one particular problem deserves mention at this stage.

It was held by the House of Lords in **Ecclesiastical Commissioners v. Rowe**[18] that where a subsisting lease is terminated by surrender by a tenant out of possession, a right of action to recover possession will immediately accrue to the lessor if the occupier at that moment is a stranger. Time

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16. Limitation Act 1980, sched. 1, para. 4;
Chadwick v. Broadwood (1840) 3 Beav. 308;
Ecclesiastical Commissioners v. Rowe (1880) 5 Ap.. Cas. 736;
Ecclesiastical Commissioners v. Tremmer [1893] 1 Ch. 166;
Walter v. Yalden [1902] 2 K.B. 304;
St. Marylebone v. Fairweather [1963] A.C. 510.
17. **St. Marylebone v. Fairweather** [1963] A.C. 510, 536.
18. Cited above; see also **Gray v. Wykeham-Martin** [1977] C.A., unrep., Bar Library Transcript 10A.

will then start to run against the lessor. It was further held in **Rowe** that this would occur even though the reason for the surrender (and whether the surrender was express or implied) was to enable the lessor to make a simultaneous grant of a new lease to the tenant.

Although the reasoning of Lord Chancellor Selborne's leading judgment in **Rowe** is impeccable, its application in the case of a surrender and simultaneous regrant does create a rare trap for unwary landlords. Nevertheless the rule is probably necessary to ensure that time can run, at some stage, against leases which are customarily renewed from time to time before they expire by effluxion of time. The rule is, however, confined to cases in which a stranger is in occupation at the crucial moment. A surrender will not have the same effect where the occupier at the moment of surrender is an under-lessee.[19] On a surrender by an intermediate landlord no right to recover possession normally accrues to the head landlord and so time does not run.

(ii) Determination of lease after tenant barred by stranger.

After time has run against the tenant, the Statute provides that the latter's title shall be extinguished. (This topic is considered in greater detail in chapter 13, below). However, after the decision of the House of Lords in **St. Marylebone v. Fairweather,**[20] it must now be regarded as beyond dispute that the rule in England is that the lessee's title is not completely extinguished. It is extinguished only as against the squatter, not as against the freeholder.

Consequently, there is no question of the lessor's reversion being accelerated and turned into an interest in possession at the moment that the lessee's title is extinguished. The lease is therefore regarded as continuing

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19. **Corpus Christi v. Rogers** (1880) 49 L.J. Ex. 4;
Ecclesiastical Commissioners v. Treemer, cited above.
20. Cited above.

to exist as between lessor and lessee until determined by some other method.[21] And until determined, time will not run against the lessor because until that time, the lessor has no right to recover possession.[22] It is now also established that in the case of unregistered land,[23] a lease can be brought to an end by any means appropriate to the tenancy, that is to say, by effluction of time,[24] by forfeiture for breach of covenant,[25] by notice, by surrender or by merger.[26]

c. Adverse receipt of rent. There is one exceptional situation in which the Statute expressly makes time run against a lessor in favour of a stranger during the subsistence of a lease.

The 1980 Act, schedule 1, paragraph 6 (1) provides that where -

(i) Someone is in possession of land by virtue of a lease in writing of which a rent of not less than £10.00 a year is reserved;[27] and

(ii) the rent is received by someone wrongfully claiming to be entitled to the land in reversion immediately expectant on the determination of the lease; and

(iii) no rent is subsequently received by the person rightfully so entitled; then the right of action is treated as accruing on the date when the rent was first received by the wrongful claimant.

The requirement of "adverse possession" (Chapter 5, above) is satisfied by schedule 1, paragraph 8 (3) (a) which provides that the wrongful recipient shall be treated as being in adverse possession.[28]

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21. **Jessamine v. Schwartz** [1976] 3 All E.R. 530;
Spectrum v. Holmes [1981] 1 All E.R. 611.
22. The lessor may then still not be able to recover possession if the occupier is a statutory tenant : **Jessamine v. Schwartz**, above.
23. The rule may be different in the case of registered land : **Spectrum v. Holmes**, cited above, discussed in Chapter 15, below.
24. **Jessamine v. Schwartz**, above.
25. **Tickner v. Buzzacot** [1965] Ch. 426.
26. **Taylor v. Twinberrow** [1930] 2 K.B. 16;
St. Marylebone v. Fairweather, above, overruling **Walter v. Yalden** above.
27. £1.00 a year for leases granted 1833 - 1980.
28. And see **Bligh v. Martin** [1968] 1 W.L.R. 804.

The application of paragraph 6 is restricted by its own specific terms. It is essential that a third party[29] should have received rent; it is not enough that the lessee in possession has withheld it,[30] or that a stranger in possession has not paid it.[31] It is also, of course, essential that any payment to a third party must have been of rent and not e.g. in satisfaction of a rent-charge.

Finally, a "wrongful" receipt is also essential. This requires more than a mere receipt without right.[33] There must be receipt under an assertion of title (although **ex hypothesi**, not a good title) inconsistent with that of the owner and not, e.g. a mere receipt as mortgagee, lessee or as a servant, bailiff, agent, receiver or trustee,[34] claiming on behalf of the owner. The paragraph does not, however, require an intentional and improper claim. A claim under a mistaken title will do.[35]

B. The Policy

The provisions of the Limitation Act 1980 relating to leases differ very little from those contained in the R.P.L.A. 1833, which was of course itself based on the recommendations made in the first report (1829) of the Real Property Commissioners. It is to that report which we must first look to discover the policy foundations of the modern laws.

The Real Property Commissioners began their work by using a technique which is now familiar to law reformers. They first circulated an announc-

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29. **Archbold v. Scully** (1861) 9 H.L.C. 360.
30. **Doe v. Oxenham** (1840) 7 M. & W. 131;
    Grant v. Ellis (1841) 9 M. & W. 113;
    Doe v. Godsill (1840) 4 Q.B. 603, n (b).
31. **Chadwick v. Broadwood** (1840) 3 Beav. 308.
32. **Doe v. Godsill**, cited above.
33. **Shaw v. Keighron** (1869) Ir. R. 3 Eq. 574.
34. **Lyell v. Kennedy** (1889) 14 App. Cas. 437.
35. **Hounsell v. Dunning** (1902) 1 Ch. 512;
    Williams v. Pott (1871) 12 Eq. 149.

ment of their appointment and invited suggestions. Then, having received "various communications from different parts of the country",[36] they prepared a series of written questions which were also circulated. Answers were obtained in writing and were supplemented by oral examination. These "Questions, Answers and Examinations" were published as an appendix to the first report. They provide the background (and sometimes, the only explanation) for the specific recommendations made by the Commissioners.

(i) General Policy

In the case of leases, the first problem is to discover why the Statute was not made to commence against a lessor until determination of the lease. The answer is straightforward and not difficult to discover. In their circulated questions, the Commissioners asked whether time could be made to run against future interests either (Q.19) from the commencement of possession by a proprietor under a conveyance which purported to pass an absolute fee simple; or alternatively, (Q.20) from the commencement of adverse possession. In asking these questions, the Commissioners clearly had in mind a suggestion made to them that time should run in such cases, although a longer than normal limitation period would be provided.[37] The response to these questions was hostile. It was generally acknowledged that the rule envisaged by Question 19 would be very convenient to purchasers. It would avoid the danger of outstanding leases. The proposed rule might therefore contribute to the safety of **de facto** titles and might reduce difficulty, expense and delay in alienating all real property.

However, two main objections were made in answer to the questions.

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36. Report, p.6.
37. Report, p.45.

First, it was widely objected that the proposed rule was unfair; the rule would cause hardship to those entitled in reversion or remainder. Such persons could not always be expected to be vigilant to protect their interests before those interests fell into possession. It might be difficult or impossible for a lessor to discover whether his interests were being threatened, or whether time was running against him. It would in any event, it was felt, be unreasonable to expect such vigilance from someone without a present right.

The second objection to the suggestion contained in Question 19 was that it might encourage fraud on the part of lessees. To deal with this danger James Humphreys[38] pointed out that it would be necessary to introduce "the doctrine of notice and similar expedients". Clearly, Humphreys felt that if this were done, the proposed rule would not produce any real advantage. The Commissioners seem to have agreed. In their first report, they stated that:

> "It has been suggested, that ... another and still longer period of limitation should likewise be established, after which enjoyment by a person as proprietor under a conveyance, regularly purporting to pass the fee simple, should give an absolute title, without regarding when the right of the adverse claimant may have accrued; but such an enactment seems unsuitable to this country, where long terms of years so generally prevail; it might encourage the fabrication of false titles, and it would be a dangerous departure from the general rule, that possession shall be regarded as adverse to any particular right only from the time when that right accrued in possession".[39]

For these reasons, the Commissioners were convinced that the fundamental policy should be that time should not run against a lessor's right to possession until the end of the lease.

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38. Author of the influential "Observations", see Chapter 2, above.
39. Report, page 45, 46.

It is perhaps worth noting that no attempt was made by the Commissioners to estimate either **(a)** the frequency with which lessors might find themselves barred by the proposed rule so that the extent of possible hardship might be gauged; or **(b)** to quantify the likely savings on alienations if the proposed rule were adopted. Nor was any attempt made to balance one factor against the other. The Commissioners acted simply on sentiment and the informed professional judgment of those conveyancers who gave evidence. As to sentiment, it is fair to say that the Commissioners' view that it would be unfair and unjust to make time run against a lessor whilst the lease subsisted, still seems to represent general legal opinion.[40]

The modern result of the policy adopted by the Commissioners is that:

> "Land held on a long lease may have been dealt with for more than 30 (now 15) years as if it were a freehold, but the purchaser will be liable to be dispossessed at the suit of the reversioner at the expiration of the term".[41]

A purchaser may therefore have investigated an apparently regular paper title to unregistered land in the usual way for at least the statutory minimum period under an open contract, but may nevertheless be liable to be dispossessed when an undiscoverable lease expires. The risk is of course well known to conveyancers. Little or no evidence is available, however, about the frequency with which claims are made in such circumstances. The risk is generally regarded by practitioners as insignificant,[42] unless some special factor in a particular paper title puts the purchaser on notice that there may be an outstanding lease. Apart from such cases,

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40. See e.g. **St. Marylebone v. Fairweather** [1963] A.C. 510, judgments of Lord Radcliffe and Lord Denning; Law Commission, Interim Report, Transfer of Title, p. 213; Law Society, October 1972, Memorandum of Evidence to Law Reform Committee, Annex, p. 3.
41. Law Commission, Interim Report, Transfer of Title, 205.
42. See e.g. Council of the Law Society, Memorandum to Law Reform Committee, October 1972, p.15.

and provided the purchaser has no exceptional need for a more prolonged investigation of title, the slight risk of an outstanding lease, which is present in all unregistered titles, is not generally regarded as requiring special precautions or as necessitating investigation of title for more than the statutory minimum period.

In the light of available evidence, the fundamental policy of the law relating to the running of time against lessors seems well founded.

This general policy is however subject to two important exceptions, which are considered in the following sections.

(ii) Periodic Tenancies - policy

It will be recalled that in the case of periodic tenancies without a lease in writing, the Statute makes time run against the lessor at the end of the first period, or at the date of last receipt of rent, whichever is the later.

The rule originated in the R.P.L.A. 1833, section 8 and was a material alteration to the pre-1833 law.[43] The alteration was not, however, suggested in the Real Property Commissioners First Report, which preceded the 1833 Act. There is, therefore, some doubt about the purposes of the rule, which have rarely been discussed by either the Court or by text writers. The aims of the rule were not even discussed in the Law Reform Committee's 21st Report, which nevertheless recommended that the rule should be abolished. The reason for the recommendation seems to have been the Commission's view that both tenancies at will and periodic tenancies without a written lease were subject to the same rule, which provided for a deemed determination at the end of the first year of tenancy, from which date time would consequently run.[44] The Committee reasoned that

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43. Hayes, Conv., 4th ed., 256.
44. 21st Report, p.46.

if their recommendation for the abolition of the special rule for tenancies at will were accepted, then "as a corollary", the special rule for periodic tenancies should also be abolished.

The Committee's reasoning is unsatisfactory. Even if the two rules had been identical (they were not)[45] nevertheless the consequences of their repeal would have been different. The Committee's report did not consider the consequences of repeal of the periodic tenancy rule.

In one respect, this difference in consequences is important and clearly demonstrable. Before 1980 the rule relating to tenancies at will was, as the Committee pointed out,[46] being circumvented by the Courts. The Courts could avoid the rule by finding that the parties had created a licence rather than tenancy. No such circumvention took place in the case of periodic tenancies, where the provisions of the Act were, in general, rigorously applied.[47]

The Committee's recommendation on this point was not in fact accepted by the Government. Lord Chancellor Hailsham explained why in moving the second reading of the Limitation Amendment Bill 1980.[48]

> "If a periodical tenant could never prescribe against his landlord when the latter vanished, he would be disinclined to improve or maintain the property and would have difficulty in making title for the purposes of a mortgage for improvements ... we decided as a matter of policy, and for the reason I have given to omit that particular thing".

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45. Tenancies at will determine at the end of first year; periodic tenancies at the end of first period, not necessarily the first year. In the latter class only, express provision is made for the late payment of rent.
46. 21st Report, p.46, and see Megary and Wade, 4th ed., p.1018.
47. See, e.g. on the meaning of "lease in writing", **Doe v. Gower** (1851) 17 Q.B.589, criticised, Sugden, Property Statutes, 2nd, 61, but followed in **Moses v. Lovegrove**, cited above; on the meaning of "periodic tenancy", **Jessamine v. Schwartz**, cited above; and on the limited effect given to para (2), see **Sanders v. Sanders** (1881) 19 Ch.D.393; **Nicholson v. England** [1926] 2 K.B. 93; cf. **Bunting v. Sergant** (1879) 13 Ch.D.330.
48. Hansard, Vol.400, (H.L.), 1232.

Lord Elwyn-Jones, Lord Hailsham's predecessor, indicated that this had also been the policy of the previous administration. However, it seems unlikely that this policy was the original reason for the provision; for if it was, the legislation was badly framed to meet it. For example:

(1) The legislation is not confined to cases in which the lessor disappears. The provision applies at the end of the first period of every periodic tenancy without a lease in writing whilst the rent is unpaid. It applies, with full force, whatever the reason for the non-payment of rent and whether because of the charity of the landlord or fault of the tenant.[49]

(2) The legislation is not confined to types of property which require improvement or maintenance. It applies to all forms of land without distinction.

(3) Nor is the legislation limited to cases in which a tenant needs help to make title so as to be able to raise money for improvements. The provision will operate even if the tenant is ignorant of the fact that time is running. It would run even if he were ignorant of the very existence of the tenancy.

The rule will also operate in favour of someone other than a tenant.[50]

(4) The official explanation also fails to show why the rule is confined to oral periodic tenancies. It is not clear why a landlord in such a case should be any more likely to disappear than the landlord of premises held by lease in writing or for a fixed term. Nor is it clear why a periodic tenant without a written lease should be more likely to wish to improve his premises, or more deserving of the law's tenderness (if he deserves any at all) than if he had a written lease from year to year, or a lease for years.

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49. See e.g. **Neall v. Beadle** (1913) 107 L.T.646; **Hayward v. Challoner** [1968] 1 Q.B.107.
50. See e.g. **Mason v. Warlow** [1941] 1 All E.R.475.

At best, therefore, the Lord Chancellor's statement seems to provide only a partial explanation for the provision. Some additional or alternative explanation is called for.

It is submitted that the true object of the provision is the avoidance of uncertainty. If rent payable under a periodic tenancy has not in fact been paid for many years, there is little doubt that the Court may, in appropriate cases, presume that the tenancy has determined. But reliance on a presumption is an uncertain process. There can also be little doubt that the present rule was originally intended to avoid this uncertainty by giving a fixed point from which time would run. There is however much more doubt about the persons for whose benefit the rule was intended.

Now if there is a logical explanation for the provision (and this is not at all clear) it does seem to the present writer that there are only three possibilities, other than that mentioned by Lord Chancellor Hailsham.

The section might have been intended either to promote some or all of the general aims of the Statute which were mentioned in Chapter 2; that is, the provision might have been intended to avoid staleness or hardship, for the benefit of persons who were originally lessess; alternatively, the provision might possibly have been intended to facilitate conveyancing by improving the quality of the guarantee of security of title which the Statute represents.

None of these possible explanations is very satisfactory. Each will be examined in turn.

(a) Avoidance of Staleness

The provision might conceivably, in some circumstances, operate so as to stay a stale claim. For it is possible that a man, having entered as a tenant, might later purchase the reversion. Thereafter, evidence of the purchase might perish, but the evidence of the original lease might persist. All this is possible. But not very likely. It seems very doubtful

that this bare possibility justifies the general form of the present rule which causes time to run as soon as rent is unpaid on any oral periodic tenancy. The writer believes that the risk of such stale claims is much less than the risk that the provision will accidentally cause time to run in favour of a tenant when a lessor carelessly (or perhaps generously) neglects to collect rent.

(b) Hardship

Here again, there is a possible explanation for the provision.

It is conceivable that the rule was intended (in part or in whole) to avoid hardship. It is arguable that even someone who entered originally as a tenant might suffer hardship if deprived of the land after many years quiet and rent free occupation. Again, however, it does not seem very likely that the bare possibility of such hardship can originally have been the reason for the provision. It seems to the writer that the possibility of hardship to a former lessee is much less than the likelihood that hardship will be caused by the provision to careless or over-generous lessors.

(c) Facilitation of conveyancing

The third and final possibility is that the provision was originally intended to avoid uncertainty, not for the benefit of lessees, but for the benefit of third parties who might afterwards acquire an interest in the land. In this thesis, it has been suggested that a major objective of the Statute is to guarantee the security of titles in unregistered conveyancing (for the reasons suggested in Chapter 3) against old claims. It is possible that the present provision is a particular example of that policy.

It was pointed out in Chapter 3 of this thesis that a purchaser of land who has investigated title back to a good root at least 15 years old, does not obtain anything like a complete history of the property's ownership. Land may have been dealt with for more than 15 years as if it were freehold, but an outstanding lease may nevertheless be concealed behind the

root. One role of the present provision, therefore, could be to avoid the risk to purchasers of outstanding periodic tenancies.

A little evidence supporting this hypothesis does exist.

Although the Real Property Commissioners in their report did not recommend the present rule (there is no reference to it at all in the report), a very similar provision was suggested to the Commissioners both in writing and in oral examination by the eminent conveyancer John Tyrrell. Examined on the topic, Tyrrell said:

> "I think it desirable to enact, that when the land is subject to a lease with a valuable rent reserved, the limitation should run from the time when the claimant was entitled to the rent and neglected to receive it ..." [51]

The reason for the suggestion was that:

> "It is often extremely difficult for a purchaser to ascertain, after several years, whether an estate was held under a lease, and consequently whether a good title has been acquired under the Statute of Limitations, and I think that a party has no greater claim to relief who does not enforce his right to rent, than if he had delayed to recover possession". [51]

It is clear, therefore, that the need to protect purchasers and simplify investigation of title formed the basis of Tyrrell's suggestion. Tyrrell's views on this point were not shared by his contemporaries. Nor do they seem originally to have been accepted by the Commissioners, because Tyrrell's suggestion that time should always run from the date of non-payment of tent, is quite inconsistent with the Commissioners general policy that time should run against a lessor only from the end of the lease. Nevertheless, Tyrrell's evidence to the Commission was undoubtedly highly influential. In bulk, it far exceeds anything contributed by any other correspondent. It is so large that it is reproduced in the Appendix to the First Report with its own comprehensive index. Tyrrell's oral examination was

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51. First Report, Appendix, p.331. See also Tyrell's written evidence p.500.

also more detailed than any other. Finally, and most telling of all, Tyrrell was himself added to the Commission in the year (1830) after the report, and before the R.P.L.A. 1833 was passed. It is not difficult to believe, therefore, that Tyrrell may have privately influenced his fellow Commissioners, including the bill's draftsman, First Commissioner Campbell,[52] afterwards Lord Chancellor Campbell, in favour of his idea that time should run if rent were not paid.

Tyrrell cannot of course have been completely successful, for the rule finally enacted was that time should run from non-payment of rent only in the case of unwritten periodic leases and not in all cases as Tyrrell suggested. Nonetheless, it is possible that the germ of the present rule is to be found in Tyrrell's suggestion and that the object of the rule is to simplify investigation of title by barring outstanding claims.

It remains to be explained why the final rule was confined to unwritten periodic tenancies. If the general policy that time should not run against a lessor until determination of a lease is sound, it is not easy to explain why an exception should be made for unwritten periodic tenancies. Very tentatively however, it is suggested that a possible explanation is that unwritten periodic tenancies were thought to pose special risks. Until fairly recently, oral periodic tenancies were very common. The Courts have also traditionally been willing to find a periodic tenancy from nothing more than evidence of possession and payment of rent. The frequency and informality of such transactions might be thought to create special

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52. Although Campbell claimed the credit (autobiography) according to Lord St. Leonards, Campell did not in fact draft the bill himself: "Lord Campbell... was in the habit of treating the able Bills which the Commissioners framed as his own. He had no hand in framing the Bills..the (Real Property Limitation) Bill was drawn elaborately by another hand" (possibly by Tyrrell?). St. Leonards: Misrepresentations in Campbell's Lives of Lyndhurst and Brougham, 45).

risks: lack of formality may make it easier to forget or overlook the true position so that the leasehold property might come to be dealt with as if it were unencumbered freehold. The existence of the tenancy might not then be easily discoverable by subsequent purchasers. Lack of formalities may also make it more difficult to determine the true nature of the original occupation, and this difficulty increases with the passage of time. Also, possibly a greater degree of negligence can be attributed to a lessor in failing to collect rent under such a lease.

It is therefore conceivable that the legislature in 1833 determined that in the interests of cheap and speedy conveyancing, a landlord should take the risk that time would run against him if he allowed a tenant under an oral periodic tenancy to remain in occupation without paying rent, so that there was neither visible sign nor regular reminder of the existence of the tenancy. In effect, the legislature chose to guarantee security in unregistered conveyancing by throwing on the landlord the burden of protecting himself, which he might do without difficulty by collecting rent (or by regularly taking a written acknowledgment of title).

Summary - oral periodic tenancies

The reason for the present rule is obscure. It is undoubtedly intended to avoid uncertainty. The legislature certainly seem to have deliberately chosen to thrust on lessors the constant obligation of preserving evidence of title, either by preserving written evidence or by collecting rent or taking annual written acknowledgments of title. But it is not clear with what aim and for whose benefit this was done.

It would also be wrong to suggest that the present rule comprehensively avoids all possibility of uncertainty. The effect of the provision has to be determined by reference to the state of the title at the moment

when time begins to run.[53] This may give rise to disputes and so to uncertainty. Similarly, there may be disputes about whether rent has been paid.[54] It is difficulty, therefore, to say precisely how the provision ought to be defended. Probably it does avoid more uncertainty than it creates. But it does carry great danger for the unwary even though a landlord can protect himself without difficulty, if he appreciates the problem.

(iii) Payment of rent to wrongful claimant

This section deals with the second exception to the general policy that time runs against a lessor only from the end of the lease.

In their circulated questions, the Commissioners asked (Limitation, Q.15) if correspondents thought that time should be made to run against a lessor from the time when rent began to be received by an adverse claimant, and not from the date on which the lease determined. This suggestion met with the almost universal approval of those responding to the question.[55] These respondents cogently reasoned that adverse receipt of tent was the equivalent of adverse possession of the soil; if time ran in favour of the former it should also run in favour of the latter. And as the Commissioners' pointed out in their report:

> "the person who is in the receipt of them (rents) can do nothing more to establish his right, and the person to whom they are denied is virtually dispossessed".[56]

The Commissioners' recommendation on this point nicely illustrates the way in which they attempted to balance competing interests against each other.

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53. Hayes, Conv., 4th, 257.
54. See e.g. **Nicholson v. England** [1926] 2 K.B. 93; **A.G. v. Stephens** (1855) 6 De G.M. & G. 111; **Doe v. Benham** (1845) 7 Q.B. 976.
55. See Appendix, First Report, 1829.
56. First Report, p. 47.

On the one hand, in the situation dealt with by the "wrongful receipt" rule, there is a receipt of rent under an asserted title; a title which is apparently regular since the rent is paid, and which might therefore later be acquired in good faith by a purchaser who was ignorant of any defect in it. On the other hand, there is the original title which the lessor has failed (possibly negligently) to assert. It was on this basis, that the Commission drew the balance in favour of the apparently regular title which had been acted on. The approach of the Commission in balancing competing interest is also illustrated in their recommendation that a minimum rent should be payable if the "wrongful receipt" rule was to apply.

> "Where no rent, or only a nominal rent is reserved, very slight negligence can be imputed to the reversioner in merely not requiring a recognition of his title from the tenant, and in such cases, till the expiration of the lease, we think there should not be a commencement of adverse possession to bar the landlord. Any rent less than twenty shillings (now £10.00)[57] a year may for this purpose be considered nominal".[58]

The quotation speaks for itself; where there is only a low rent, the true owner will not necessarily have been negligent in failing to collect it; the balance, as between wrongful recipient and purchaser, must therefore in fairness be drawn in favour of the owner.

Summary and conclusions - wrongful receipt of rent

The "wrongful receipt" rule is a significant guarantee of the security of unregistered reversions whilst rent is being received. The rule is unlikely, on the other hand, to cause widespread hardship to lessors since time cannot run if rent is collected. It is conceivable, however, that in a few cases the rule might work hardship, e.g., in the case of a lessor

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57. Limitation Act 1980, Sched. 1.
58. First Report, p.47.

by succession who was not aware of his right to receive rent. This bare possibility is probably outweighed by the positive benefits of the rule. The provision also gives a good illustration of the role which the Statute plays in balancing competing interests.

C Tenant's Encroachments

The law relating to encroachments made by tenants on adjoining land is complex and obscure. Since the rules are not derived from the Statute but are judicial creations, the topic is best dealt with separately. It is the subject of this section.

The rule seems to be that where a tenant encroaches upon adjacent land, it is presumed that the land so taken is held as part of the demised premises. On the determination of the tenancy, the land must be given up to the landlord together with the demised premises, unless the presumption can be rebutted. It can probably be rebutted by showing that the encroachment was made by the tenant for his own benefit.

The origins of this rule are not clear. It seems to have been well established by 1834, when Baron Parke was able to say with confidence that:

> "It is clearly settled that encroachments made by a tenant are for the benefit of his landlord"[59]

However, the first reported cases in which mention is made of the point are noted very shortly only 40 years before in Espinasse's nisi prius series. And in the first of these cases, **Doe v. Mulliner**[60] Lord Kenyon is reported to have rejected the doctrine and allowed a tenant to acquire a title by adverse possession to part of a waste. In **Doe v. Davies,**[61] however, decided shortly afterwards, it is stated that the opinion of the leading judges was in favour of the doctrine. The presumption seems therefore to have been first applied in cases of encroachments by tenants on the

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59. **Doe v. Rees** (1834) 6 C.& P. 610.
60. (1795) 1 Esp. 460.
61. (1795) 1 Esp. 461.

waste of a manor, where the landlord was also lord of the manor.[62] It was subsequently extended to waste of which someone else was lord,[63] and then to land other than "waste" in the technical sense.[64]

Accordingly, it appears that the doctrine is now perfectly general and applies to whoever may own the land and whatever the nature of the land. However, to raise the presumption, the land encroached upon must either adjoin the demised premises, or (when separated) be so close to them that the tenant gained the opportunity to encroach by virtue of his tenancy.[65] The presumption has been applied where the land was separated from the demised premises by a path,[66] by a road,[67] a small river or a strip of waste,[68] but not when separated by the sea and intervening land;[69] it probably would not be applied where other land occupied by a third party intervenes.[70]

It is also now clearly settled that the "encroachment rule" is not a rule of law but merely a rebuttable presumption.[71] The tenant may

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62. See **Bryan v. Winwood** (1808) 1 Taunt. 208; **Doe v. Williams** (1836) 7 C.&.P.610; **Andrews v. Hailes** (1853) 2 E.& B.353, 354.
63. **Doe v. Janes** (1846) 15 M.& W. 580; **Doe v. Tidbury** 14 C.B. 3251; **Lisburne v. Davies** (1866) L.R. 1 C.P. 268; **Whitmore v. Humphreys** (1871) L.R. 7 C.P.1.
64. **Doe v. Massey** (1851) 17 Q.B. 373; **Kingsmill v. Millard** (1855) 11 Ex. 315; **East Stonehouse v. Willoughby** [1902] 2 K.B.318; **Smirk v. Lyndale** [1974] 3 W.L.R.91; cf. **Lord Hastings v. Saddler** (1898) 15 T.L.R.24.
65. **Lisburne v. Davies**, above.
66. **Smirk v. Lyndale**, above.
67. **Bryan v. Windwood**, above; **Andrews v. Hailes**, above.
68. **Lisburne v. Davies**, above.
69. **Lord Hastings v. Saddler**, above.
70. **Andrews v. Hailes**, above.
71. **Whitmore v. Humphreys**, above. **Smirk v. Lyndale**, above.

rebut the presumption by showing that he intended to hold the disputed property for his own benefit and not as part of the demised premises. He may do this by reference to the circumstances of the original encroachment or even to events occuring afterwards.

There is, however, some uncertainty about the particular means by which a tenant may rebut the presumption. It seems that the presumption may be rebutted if the tenant had already occupied adjacent land as a squatter before his tenancy began.[72] Similarly, if the tenant during the subsistence of his lease purchases adjacent land from a stranger who has taken possession without title, then the tenant may obtain a title to the adjacent land as against his own landlord.[73] The presumption may also be rebutted if the tenant continues to occupy the encroachment after his landlord has refused him permission to do so;[74] or if the landlord grants the tenant a subsequent lease which does not include the disputed land.[75]

However, it is doubtful whether a tenant can rebut the presumption by reference to facts which are not known to his landlord.

Although a long series of **obiter dicta** dealing with rebuttal of the presumption make no mention of the need for communication of relevant facts to the landlord,[76] there are two express decisions in which knowledge or notice has been required.

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72. **Dixon v. Baty** (1866) L.R. 1 Ex. 259.
73. **Lisburne v. Davies**, above.
74. **Doe v. Massey**, above; cf. **Perrot v. Cohen** [1951] 1 K.B. 705.
75. **A.G. v. Tomline** (1880) 15 Ch.D. 150; cf. **Smirk v. Lyndale**, above.
76. **Doe v. Rees**, above; **Doe v. Jones**, above; **Doe v. Tidbury**, above; **Nesbitt v. Mablethorpe** [1918] 2 K.B.1, 15.

In **Kingsmill v. Millard,**[77] approved in **Smirk v. Lyndale,**[78] it was stated that a conveyance by the tenant of the encroachment would rebut the presumption only if the landlord had notice of it. In **Smirk,** it was held that the unilateral intention of a tenant to hold for his own benefit would rebut the presumption only if the intention was communicated to the landlord.

If these decisions establish that knowledge or communication is necessary in all cases, the paradoxical result is that whilst the landlord need not know of the encroachment[79] before the presumption will operate, he must be told before it can be rebutted. This makes no sense where the adjacent land does not belong to the landlord, because if the land is not his, the knowledge will not be any use to him. Possibly therefore, the two express decisions might be confined to their own facts, both being cases in which the tenant encroached on his own landlord's property.

There is also considerable uncertainty as to the basis of the doctrine.

The best that can be done is to collect a list of alternative hypotheses from the cases. The possible explanations are as follows:

(a) Where the encroachment is on the waste of the lessor's manor, the tenant it to be considered as having "approved" on behalf of the landlord.[80] This might explain the origin of the doctrine, but it is clearly an inadequate explanation for the modern form of the rule.[81]

(b) The encroachment is presumed to have been made by the tenant for, or with the consent of the landlord.[82]

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77. above.
78. Above, not following **Lord Hastings v. Saddler,** cited above.
79. **Whitmore v. Humphreys,** (1871) L.R.7 C.P.1.6.
80. **Doe v. Tidbury,** above; **Lisburne v. Davies,** above; Darby & Bosanquet, Limitations, 2nd, p.501.
81. See **Bryan v. Winwood,** above; **Kingsmill v. Millard,** above; **Whitmore v. Humphreys,** above.
82. **Doe v. Williams,** above; Darby & Bosanquet, Limitations, 2nd, 1899, p.501.

This early idea (probably a variant on (a) above) might again explain the origin of the rule - but as applied to the modern rule, it, seems to require the Court to presume the landlord to be a trespasser. It has therefore been rejected as a general explanation.[83]

(c) Estoppel. The explanation here seems to be that where property is gotton by virtue of occupation of the demised premises and is then used as part of the holding, the tenant should not later be allowed to dispute the lessor's title to it.

Although this is the most widely accepted explanation,[84] the estoppel is of apeculiar kind. Since the lessor need not know of the encroachment before the presumption is raised, he will not necessarily have relied on it; nor will he necessarily have been in a position (e.g. where the encroachment is on a neighbour's land) to do anything about it. It is also unusual for an estoppel to give rise merely to a rebuttable presumption.

(d) Confusion of boundaries; it has been suggested that since a tenant is under an obligation to preserve his landlord's boundary, then if a boundary does become confused in adjoining land there ought to be a presumption against the tenant that the enclosed land as part of the holding.[85]

Again, this will do as an explanation in some cases, but not in all. For example, the encroachment rule can apply to land which is separated from the demised premises and where no boundary issue is involved.

(e) Fiduciary duty; in **A.G. v. Tomline**[86] Cotton L.J. suggested that the rule was designed to prevent material depreciation of the value of the

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83. **Doe v. Mulliner**, above; **Andrews v. Hailes**, above; **Kingsmill v. Millard**, above.
84. **Doe v. Rees**, above; **Andrews v. Hailes** above; **Doe v. Tidbury**, above; **Kingsmill v. Millard**, above; **Whitmore v. Humphreys**, above; **A.G. v. Tomline**, above.
85. See **Andrews v. Hailes**, cited above.
86. Above.

lessor's premises by acquisition of title by a tenant to small pieces of boundary land.

This might well be a good reason in the precise circumstances which Cotton L.J. envisaged. But it cannot possibly be a general explanation. The rule is not confined to small pieces of land nor to land on the tenant's boundary.[87]

(f) Finally, in a case in which the land encroached upon belonged to a third party, it was suggested that the reason for the rule is that the tenant ought not to benefit from his own wrong.[88]

This explanation is deficient because it fails to explain why the lessor should be given a benefit which is denied to the tenant.

It seems fair to conclude that the precise basis of the doctrine cannot be stated with certainty.

However, there can be little doubt that the substantial reason for the rule is to be found in a natural desire on the part of the Court to protect landlords against unfair reliance on the Statute by tenants. It is necessary to add that the wider policy of the Statute of Limitation in relation to claims to recover land - in particular the provision of a guarantee of title against old claims - seems never to have been considered in the reported cases. Fortunately, in these circumstances, the "encroachment rule" does not appear to prejudice the policy of the legislation by giving rise to substantial uncertainty in title. Clearly, the doctrine may pose a theoretical risk since it is possible to envisage circumstances in which an encroachment might be dealt with over a number of years as

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87. See **Lisburne v. Davies,** above where 3 acres at some distance from holding were involved.
88. **Andrews v. Hailes** above, (Erle J.).

freehold and yet might nevertheless be claimed by a lessor on the determination of a lease of adjacent land. But, this bare possibility is rightly, not generally regarded as a substantial risk by conveyancers where a paper title, supported by actual possession, can be proved in the conventional manner.

Tenants Encroachments - Summary and Conclusions

The rule relating to encroachments made by a tenant on adjacent land is complex and obscure. Its origins are not clear; the precise ambit of the rule is vague. Nor is there any general agreement on the purpose of the rule. However, in some cases the rule may have the benevolent effect of protecting a landlord against an unmeritorious defence based on the Statute. The rule appears to have this effect without being noticeably unfair to tenants. Nor does the rule seem in practice to prejudice the policy of certainty of title embodied in the legislation.

CHAPTER 9

MORTGAGES

Where land is subject to a mortgage, the Statute may operate **(1)** in favour of the Mortgagor against the Mortgagee; **(2)** in favour of the Mortgagee against the Mortgagor; and **(3)** in favour of a stranger and against either Mortgagor alone or against both Mortgagor and Mortgagee.[1]

1. In favour of the Mortgagor

The mortgagee's remedies against the land are the right to take possession and the right to foreclose. Both are "actions to recover land" for the purposes of the Limitation Act 1980,[2] and both actions are barred after 12 years from the date when time begins to run.

There is, however, a dispute about what this date is. Megarry and Wade[3] state that the appropriate date in both cases is the date when repayment becomes due under the mortgage. Franks,[4] on the other hand, takes the view that a mortgagee's right to possession and his right to foreclose must be considered separately, since time will not necessarily run from the same moment against both rights. This view seems to be the better in principle.

(a) The right to possession

A legal mortgagee's right to possession, in the absence of statutory restriction or stipulation to the contrary, arises on execution of the mort-

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1. Lightwood, Time Limits, p.85.
2. Section 20 (4); section 38 (7).
3. 4th ed., 1019. See also Preston & Newsom (2nd p. 121).
4. Limitation, (1959), p. 151; See also Hals. Laws, 4th Vol. 28, Title Limitation, pp. 817, 831.

age.[5] This right is not conditional on the mortgagor being in default.[6] In theory, therefore, time will run against the mortgagee's right to possession from the date of execution of the mortgage.[7]

However, in practice time will rarely run from this date. First, there may be some "stipulation to the contrary" in the mortgage, depriving the mortgagee of an immediate right to possession. Such a stipulation might take the form of an attornment clause, or of a re-demise to the mortgagor,[8] or of a covenant providing for the retention of possession by the mortgagor until a specified event occurs e.g. until default.

"Attornment clause": if the mortgagor attorns tenant to the mortgagee, time will not run against the latter until the tenancy is determined, since it is not until determination that the mortgagee has a right of entry.[9]

"Re-demise": if a re-demise to the mortgagor can be found, again the mortgagee will have no immediate right to possession[10] and so time will not run until the tenancy has determined and a right to possession has accrued to the mortgagee.[11]

"Covenant for retention of possession by Mortgagor": Professor E.C. Ryder has suggested[12] that where a term of the mortgage provides for retention of possession by the mortgagor (and such a provision may be implied in

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5. L.P.A. 1925, s.95 (4); **Four-Maids v. Dudley Marshall Properties Ltd.** [1957] Ch.. 317; **Wright v. Pepin** [1954] 1 W.L.R. 635; Fisher & Lightwood, Law of Mortgages, 9th ed., (1977), 285.
6. **Birmingham Citizens Permanent B.S. v. Caunt** [1962] Ch. 883; cf. **Quennel v. Maltby** [1979] 1 All E.R. 568.
7. **Doe v. Lightfoot** (1841) 8 M. & W. 553; **Wright v. Pepin**, cited above.
8. See e.g. **Doe v. Lightfoot**, cited above.
9. **Hinckley v. Henney** [1953] 1 W.L.R. 352; **Woolwich B.S. v. Preston** [1938] Ch. 129.
10. **Wilkinson v. Hall** (1837) 3 Bing (N.C.) 508; **Doe v. Goldwin** (1841) 2 Q.B. 143; **Scobie v. Collins** (1895) 1 Q.B. 375; **Pinhorn v. Souster** (1853) 8 Exch. 763.
11. **Doe v. Lightfoot**, cited above; **Doe v. Day** (1842) 2 Q.B.. 147.
12. (1969) 22 Current Legal Problems, 129.

an instalment mortgage[13]) but does not create a lease,[14] the mortgagor should be regarded as a contractual licensee. If the mortgagee is thus deprived of the immediate right to possession which would otherwise arise on execution of the mortgage, it seems that time would not run until determination of the licence.

There is a second reason why time will rarely run against a mortgagee's right to possession from the date of execution of the mortgage.

The Statute provides (section 29) that if the person in possession of the land acknowledges the mortgagee's title or makes any payment in respect of the debt (whether of principal or interest) then time runs only from the date of acknowledgment or payment. Time may, therefore, be continually running afresh as long as a mortgagor is making payments to a mortgagee.[15]

This particular rule did not originate in the R.P.L.A. 1833, which made no special provision for the case of a mortgagor in possession. This led to fears that, under the general rule of the Statute, time might run against the mortgagee from the date of execution of the mortgage, notwithstanding that the mortgagor was regularly paying any interest due.[16] The R.P.L.A. 1837 (now L.A. 1980, s.29) was therefore passed to remedy the situation[17] and to keep the mortgagor's rights alive while any payment under the mortgage is being made.

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13. **Esso Petroleum v. Alstonbridge** [1975] 3 All E.R. 358.
14. See e.g. **Doe v. Day**, cited above.
15. Section 29 (7).
16. **Doe v. Lightfoot** (1841) 8 M. & W. 553;
    Doe v. Williams (1836) 5 A. & E. 29;
    Eyre v. Walsh (1860) 10 Ir.C.L.R. 346;
    Heath v. Pugh (1881) 6 Q.B.D. 345;
    Thornton v. France [1897] 2 Q.B. 143.
17. **Wrixon v. Vize** (1842) Dr. & War. 104, 116;
    Purnell v. Roche [1927] 2 Ch. 142.

(b) Foreclosure

A foreclosure action is treated by the Statute as an action to recover land.[18] Time begins to run against this right at the moment when it arises, which is on default in repayment on the date fixed for redemption,[19] or where the principal is only repayable after a demand, on a demand being made.[20] Again, however, there is a fresh accrual and a new **terminus a quo** every time title is acknowledged or a payment[21] is made under the mortgage[22] while time is running, but not thereafter.[23]

(c) **Terminus ad quem**

Although a mortgagee has two distinct remedies against the land, it does not seem possible for time to finally run and expire against one of the remedies if the mortgagor has pursued the other. Time will cease to run against the right to foreclose if the mortgagee takes possession.[24]

On the other hand, if a mortgagor obtains a foreclosure order absolute, but does not retake possession of the land from the mortgagor, time runs only from the date of the order, since the effect of the order is to vest in the mortgagee a completely new title as owner.[25]

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18. 1980 Act, s.20 (4).
19. **Kibble v. Fairthorne [1895]** 1 Ch. 225;
Sam. Johnson v. Brock [1907] 2 Ch. 533;
Wakefield v. Yates [1916] 1 Ch. 452;
Purnell v. Roche, cited above.
20. **Lloyd's Bank Ltd. v. Margolis** [1954] 1 All E.R. 734, 737, 738.
In the case of a mortgage of a future interest, it is not clear whether time runs from the date on which the right to foreclose arises (**Wakefield v. Yates,** cited above), or from the date on which the future interest falls into possession : **Hugill v. Wilkinson** (1888) 38 Ch.D. 480. Probably the latter is correct.
21. If the same person temporarily unites the character of mortgagor and mortgagee, a constructive payment of interest may be assumed.
22. L.A. 1980, s.29 (3).
23. L.A. 1980, s.29.
24. L.A. 1980, sched. 1, para. 8.
25. **Heath v. Pugh,** cited above.

(d) Policy

It seems likely that one important reason for making time run against a mortgagee out of possession is to ensure that the mortgagor may feel confident after the lapse of the statutory period, that an incident which might have led to a claim against him is finally closed. This reason is a general policy objective of the law of limitation of actions.[26] It seems desirable that a mortgagor in possession who has paid neither principal nor interest and who has not acknowledged the mortgagees title, should be able to be sure that the mortgage can no longer be enforced against him after the lapse of a certain period of years. This may enable him to deal with the land as unencumbered owner (either by disposing of or developing the property) with confidence that the old claim cannot be asserted.

It is also possible that, in this instance, the law is intended to avoid the dangers of litigation on stale claims, where evidence has been lost or receipts destroyed.

It does not seem likely that the need to simplify conveyancing forms a substantial reason for the present rule. It is always possible that a mortgagor might seek to deal with his land in disregard of the mortgagees rights. But the risk of a reasonably prudent purchaser being prejudiced in such a case is generally regarded as minimal. The absence of title deeds, which are of course normally required to be deposited by mortgagees, has long been regarded as sufficient warning to a potential purchaser of the possible existence of an undischarged mortgage; this scheme of protection has been refined and improved by the registration provisions of the Land Changes Act.

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26. See Chapter 2 above.

The possibility of an outstanding undischarged mortgage is not therefore something against which a purchaser will normally need protection under the Limitation Act.

2. In Favour of the Mortgagee

Redemption actions are not subject to the general provisions of the Limitation Act 1980 governing actions to recover land. The general statutory provisions which require the accrual of a cause of action as well as adverse possession do not apply here. Redemption actions are dealt with quite separately by section 16 of the 1980 Act which provides that no such action shall be brought[27] where a mortgagee has been in possession of the land[28] for 12 years.

However, this apparently straightforward rule does require some qualification.

First, to take advantage of this provision, the mortgagee must enter and remain in possession **solely** in his capacity as mortgagee.[29] If the mortgagee has when he enters, or if he later acquires, some other title to the property (i.e. if he has or acquires a limited interest in the equity of redemption) he will not occupy **solely** in the capacity of mortgagee and accordingly, time will not run under this rule.[30]

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27. Whether by the mortgagor or any other person who claims through him - e.g. a remainderman, where land subject to a mortgage is later settled : **Harrison v. Hollins** (1812) 1 Sim. & St. 471.
28. Or of part of it : section 16, 1980 Act, consolidating **Kinsman v. Rouse** (1881) 17 Ch. 104.
29. **Raffety v. King** (1836) 1 Keen 601;
Hyde v. Dallaway (1843) 2 Hare 528.
30. **Hyde v. Dallaway**, cited above;
Hodgson v. Salt [1936] 1 All E.R. 95;
cf. **Browne v. Bishop of Cork** (1839) 1 Dr. & War. 700.

Second, if the mortgagee is in possession by virtue of the mortgage, time will begin to run afresh whenever he receives any sum in respect of principal or interest,[31] or if he acknowledges in writing the title of the mortgagor or his equity of redemption.[32]

Policy

The reasons for barring a mortgagor's right to redeem after long possession by a mortgagee seem to be the same as those discussed at the end of the first section of this chapter: i.e. (i) that it is desirable that the mortagee should be able to feel confident, after the lapse of the statutory period, that no claim under the mortgage can be made against him; and (ii) that it is desirable to avoid litigation on old and possibly stale claims, the evidence relating to which has been lost or destroyed.

This rule does not seem to cause great hardship to mortgagors. Nowadays, mortgagees of land rarely take possession except by way of enforcing security[33] and then usually only for a short period until sale. Moreover, if the occupation of a mortgagee does happen to continue for a long time, the mortgagor may protect himself against the statute either by making a payment on account of the principal or of interest, or by insisting on a formal acknowledgment of title.

3. In Favour of a Stranger

The statute may operate in favour of a stranger against either a mortgagor or against both mortgagee and mortgagor.[34]

Two situations must be distinguished.

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31. **Harlock v. Ashberry** (1882) 19 Ch.D. 579;
Re Lord Clifton [1900] 1 Ch. 774.
32. L.A. 1980, s. 29.(4).
33. Law Revision Committee, 1936 Report, p. 15.
34. Franks, Limitations, 156.

(a) Stranger takes possession before mortgage granted.

In this case time will have commenced to run against the mortgagor, who will be barred at the end of the limitation period. The mortgagee will also be barred, not 12 years from the date of the mortgage, but at the same time as the mortgagor through whom he claims.[35] If the rule were otherwise, it has been said that in any case in which a man's title to land was on the point of being barred, all he would have to do to avoid the Statute would be to execute a mortgage of the land, and then subsequently in his own time to pay off the mortgage.[36]

This rationale is not completely convincing; a mortgagor may in any event avoid the Statute by simply commencing proceedings, or by taking an acknowledgment of title. The present rule is probably better regarded as an example of the wider principle[37] that once time has begun to run, in the interests of certainty, the person against whom time is running should not unilaterally be able to affect the length of the limitation period.

Whatever the reason for it the rule is unlikely to prejudice prudent mortgagees, who would naturally make sure that any potential mortgagor was in possession or in receipt of rents, before making an advance.[38]

(b) Stranger takes possession after date of mortgage.

On this event, a cause of action will accrue to the mortgagor, who will be barred at the end of the appropriate limitation period. **Prima facie**, the mortgagee will also be barred at the same date.[39] However, the mortgagee's rights (but not the mortgagor's) may be saved if the stranger subsequently acknowledges the mortgagee's title or makes a payment

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35. **Thornton v. France** [1897] 2 Q.B. 143. This decision must prevail over **Doe v. Eyre** (1851) 17 A.B. 366 and **Doe v. Massey** (1851) 17 Q.B. 373, to the extent that the latter decisions are inconsistent with it. See also **Munster &. Leinster Bank Ltd. v. Croker** [1940] I.R. 185.
36. **Thornton v. France** [1897] 2 Q.B. 143, 156.
37. See Chapter 4.
38. **Thornton v. France** [1897] 2 Q.B. 143, 158.
39. **Hemming v. Blanton** (1973) 42 L.J.C.P. 158.

in respect of capital or interest. It has also been held that the mortgagee's rights may be saved if the **mortgagor**, even though out of possession, subsequently makes a payment in respect of capital or interest. This decision is now consolidated in section 29 of the 1980 Act which provides that if "the person liable for the mortgage debt makes any payment in respect of the debt" then the mortgagee's right of action shall be treated as accruing on and not before the date of payment. This provision is not confined to proceedings between mortgagor and mortgagee or to payments by a mortgagor in possession. [40]

Paradoxically, therefore, a payment made by a dispossessed mortgagor may save the mortgagee's rights, although it will not save those of the mortgagor. [41]

This rule is no doubt a protection to mortgagees, who are thereby relieved of any obligation to keep an eye on the property to ensure that no squatter has taken possession. On the other hand, it is clear that in some cases, the rule might operate to the prejudice of a purchaser taking in good faith from a vendor without title. In such a case, neither purchaser nor vendor might be aware of a fatal flaw in the vendor's title and neither might be able to discover the existence of a mortgage kept on foot by payments made without their knowledge by a person not in possession of the land. [42]

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40. L.A. 1980, s. 29 (2), (3).
41. **Doe v. Eyre** (1851) 17 Q.B. 366;
Eyre v. Walsh (1860) 10 Ir. C.L.R. 346;
Ford v. Ager (1863) 2 H. & C. 279;
Fletcher v. Bird (1896), see Fisher and Lightwood, Laws of Mortgages 6th ed., 1025.
Ludbrook v. Ludbrook [1901] 2 K.B. 96.
42. The provision can only operate in favour of a mortgagee. A person who has taken a conveyance in which a mortgagee joins, or takes a conveyance from a mortgagor and later pays off the mortgage, is probably not a 'mortgagee' for this purpose: **Thornton v. France** [1897] 2 Q.B. 143.

However, the conveyancing evidence suggests that the risk of hardship to an innocent purchaser is considerably less than the burden which would be thrown on **all** morgagees if the rule were otherwise. In this instance, therefore, the Statute no doubt correctly prefers to subordinate "the transmission interest" in land (i.e. the protection of purchasers) to "the enjoyment interest" (the protection of present owners).

CHAPTER 10

TRUSTS

Introduction

Before 1833 the various statutes of limitation applied only to legal remedies and therefore had no direct operation on equitable estates or interests.[1] However, for many years before 1833 courts of equity had in practice refused relief after the lapse of 20 years (either by analogy or "in obedience" to the statutes)[2] in some cases where, if the claim had been legal instead of equitable, lapse of time would have been a bar.[3] Both before and after the Act of 1833 in considering any question of limitation in equity, it is necessary to distinguish the operation of the limitation rules **(I)** in favour of a trustee; **(II)** in favour of a beneficiary; and **(III)** in favour of a stranger.

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1. Real Property Commissioners, 1st report, 48;
   Beckford v. Wade (1805) 17 Ves. Jun. 87,97.
2. For precise meaning and ambit of acting "in obedience", and the difference between this and acting "by analogy", see Brunyate, Limitations in Equity, 4 to 22.
3. Tothill, Ch. Cas. 178;
   Lockey v. Lockey (1714) Prec. in Ch. 518;
   Smith v. Clay (1767) Ambl. 645;
   Hovenden v. Lord Annesley (1806) 2 Sch. & Lef. 607;
   Cholmondley v. Clinton (1821) 4 Bli. 1; 2 Jac. & W.1.
   The early cases are reviewed in **Kane v. Bloodgood** (1823) 7 Johns. Cha. 90 (New York) by Chancellor Kent.

I. In favour of a trustee

(1) Before 1833

Before 1833, it seems to have been generally accepted in England that when an express trustee was in possession, his possession was to be regarded as being the possession of the beneficiary. The fact that the trustee had omitted to discharge the trust was no bar to the beneficary's claim against him.[5] But the rule was otherwise where the trust was not an express or direct trust declared by the parties, but was rather a trust by implication arising from the circumstances or from the acts of the parties. Claims in respect of such constructive trusts were liable to be barred.[6]

The reason for the distinction seems to have been that at least by the middle of the 18th century, the courts of equity had become convinced that the Statute would have beneficial effects if applied to constructive trusts. A number of reasons were stated for allowing the application of the Statute. In the leading case of **Beckford v. Wade**,[7] Grant M.R. attached importance to the need to bar stale claims, the evidence of which might perish with time. This was seen as being particularly important in the case of constructive trusts where disputes of fact were more likely:

> "Questions of that kind almost always depend upon controverted facts; and according to every principle upon which the Statutes of Limitation are grounded, long possession ought to secure a party against the necessity of entering into such a controversy at a distance of time".[8]

But the need to bar stale claims was not the only reason for applying the statute to all except express trusts. Other relevant considerations

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4. Cf. **Kane v. Bloodgood**, cited above.
5. **Hovenden v. Annesley**, cited above;
   Chalmer v. Bradley (1819) 1 Jac. & W. 51, 67.
6. **Townshend v. Townshend** (1783) 1 Broc. C.C. 550, 555;
   Beckford v. Wade (1805) 17 Ves. Jun. 87, 95.
7. Cited above.
8. Cited above, at p.95.

were the neglect of the plaintiff in asserting a remedy and the evidence of acquiesence provided by the delay:

> "No time bars a direct trust, as between **cestui que trust** and trustee; but, if it is meant to be asserted, that a Court of Equity allows a man to make out a case of constructive trust at any distance of time, after the facts and circumstances happened, out of which it arises, I am not aware, that there is any ground for a doctrine, so fatal to the security of property as that would be; so far from it, that not only in circumstances, where the length of time would render it extremely difficult to ascertain the true state of the facts, but where the true state of the facts is acertained, and where it is perfectly clear, that relief would originally have been given on the ground of constructive trust, it is refused to the party who after long acquiesence comes in a Court of Equity to seek that relief".[9]

In this passage, the Master of the Rolls refers, significantly, to the need to safeguard the "security of property". This objective continued to be an important element in the thinking of equity judges throughout the 19th century.[10]

Although equity judges rarely said precisely what they meant by "safeguarding the security of property" or by the alternative phrase which they used, "quieting title", it is reasonably clear that their aim was to clear away old and doubtful claims against titles supported by long-continued possession:

> "It is of the greatest importance to the security of property and the peace of families, that the fullest effect should be given to the very beneficial statute by which such a possession (possession and enjoyment for 20 years and upwards) is clothed, as it ought to be, with an unimpeachable title".[11]

> "The general law of limitation is ... with a view to public benefit, because it is in the public interest that long possession should remain undisturbed".[12]

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9. Cited above, at p. 96.
10. **Magdallen College v. Att. Gen.** (1857) 6 H.L.C. 189, 216;
Malone v. O'Connor (1859) 9 Ir.Ch.R. 459;
Yardley v. Holland (1875) 20 Eq. 428;
Thomson v. Eastwood (1877) 2 A.C. 215;
Magdallen v. Knotts (1879) 4 A.C. 324;
Taylor v. Davies [1920] A.C. 636, P.C.
11. **Malone v. O'Connor**, cited above, at p. 469
12. **Malone v. O'Connor**, cited above, at p. 477.

This policy seems to have been based in part on a desire to avoid hardship to defendants. Such hardship might arise in a number of ways; the passage of time and delay on the part of a plaintiff might cause a defendant to change his position. The defendant might for example have fixed his mode of life, or disposed of his other assets, on the assumption that the plaintiff had no right or would not assert one.[13]

The policy was also probably in part based on a desire to encourage utilisation of land in reliance on the appearance of ownership which possession gives.

On the other hand, however, it seems unlikely that the need to ensure ease, speed and certainty in the alienation of property formed a dominant element in the policy. Equitable claims were not at any relevant time enforceable against a bona fide purchaser of a legal estate for value without notice. So a prudent purchaser making the usual investigations was protected against undiscovered equitable claims; this protection did not exist where the claims were legal. Naturally, therefore, the ability of the Statute to ensure cheap and speedy conveyancing by guaranteeing that stale claims were barred, was much more important to legal than it was to equitable claims. However, the Statute nevertheless had a minor role to play in this context in the case of equitable claims. Not all recipients of trust property (e.g. those purchasing only an equitable interest) fall within the tight definition of a "bona fide purchaser". Much more important in the context of "quieting titles" was the idea that by barring old claims by a limitation rule which operated with certainty (unlike the doctrine of laches, which is applied or not according to the Court's appreciation of the circumstances) old stains on a title could be seen with certainty

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13. This consideration was relevant when the doctrine of laches was in issue:
Turner v. Collins (1871) 7 Ch. 329;
Allcard v. Skinner (1887) 36 Ch.D.192, C.A.

to have been removed. This might have the beneficial effect of clearly barring a possible claim apparent on inspection of title and so avoiding the need for a prolonged investigation which might otherwise be necessary to determine the merits of the claim; in this way, the Statute might even make marketable a good title which a reasonably prudent purchaser would otherwise have had to decline:

> "Without a positive law to refer to, some uncertainty and some uneasiness must prevail, and practising lawyers sometimes find it impossible to give a confident opinion upon titles submitted to them". [14]

It is of course necessary to remember that probably before and certainly after the R.P.L.A. 1833, an old claim might be barred without any fault on the part of and with great prejudice to a claimant. But to the question, "Why should the long-suffering of a wrong bar the remedy", equity in the 19th century, [15] contented itself with the reflection that:

> "The general law of limitation is not with a view to the benefit of the individuals who may be in possession or out of possession, who may have title, or not have title, but it is with a view to public benefit, because it is the public policy that long possession should remain undisturbed. A Court of Equity goes further than this; and I use the expressive language of one of the greatest of Equity Judges when I say this, that if the demand is made under circumstances of inconvenience to individuals, that would break in upon those principles which are established for the peace of all families constituting the great family of the public, Courts of Equity have said you must go to those Courts that were not made for a righteous man, if there be such Courts; you cannot have relief in a Court of Equity". [16]

However, it is necessary to stress that this line of reasoning only applied to constructive trusts. Neither before or after 1833 did the Statute operate as between beneficiary and express trustee.

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14. Real Prop. Cmrs., 1st Rep., p.49.
15. And still today: **Hayward v. Challoner** [1968] 1 Q.B. 107.
16. **Malone v. O'Connor**, cited above, p. 477.

II. The R.P.L.A. 1833

The distinction between express and constructive trusts was preserved by the R.P.L.A. 1833 on the recommendation of the Real Property Commission.[17] Under the scheme adopted by that Act, all equitable claims to recover land were assimilated to legal claims and so were liable to be barred.[18]

Thus, time would run in favour of a constructive trustee, as for example in the case of a tenant for life of leasehold property who obtained a renewal to himself.[19] However, an exception to this general rule was created for cases where land was vested in a trustee on an express trust. In this case, the Statute provided that no cause of action to recover the land should accrue to the beneficiary and so time would not run whilst the trustee retained possession.[20] But a cause of action did accrue and so time did begin to run in favour of a purchaser for value[21] from the moment the land was conveyed to him.[22] Time would run notwithstanding that the purchaser for value had notice of the trust.[23]

The Act of 1833 was therefore very favourable to possessors and purchasers since the legislation, to some extent, subordinated the interests of beneficiaries to its policy of avoiding stale claims, and quieting possession.

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17. Real Prop. Cmrs., 1st Rep., 49.
18. R.P.L.A. 1833, s.24.
19. **Petre v. Petre** (1853) 1 Drew. 371; **Re Dane's Estate** (1871) L.R. 5 Eq. 498.
    See also **Toft v. Stephenson** (1848) 7 Hare 1 (vendor's lien); **Malone v. O'Connor**, cited above; **Pyrah v. Woodcock** (1871) 24 L.T. 407.
20. **A.G. v. Flint** (1844) 4 Hare 147, 155; **Burroughs v. McCreight** (1844) 1 Jo. & Lat. 290;
    Law v. Bagwell (1843) 4 Dr. & War. 398, 408.
21. **Law v. Bagwell**, as above; **Magdalen College v. A.G.** (1857) 6 H.L.C. 189;
    Petre v. Petre, above; **A.G. v. Payne** (1859) 27 Beav. 168; **A.G. v. Davey** (1859) 4 De G. & J. 136.
22. But it still did not run in favour of the original trustee: **Magdalen College v. A.G.**, above; Judicature Act 1873, s.25 (2).
23. e.g. **Petre v. Petre**, above.

And the courts seem, in the years immediately after the Act of 1833, to have been reasonably content with this policy. For in a series of decisions, a number of doubtful points of construction in the legislation were resolved in favour of allowing a plea of limitation: e.g., a lessee was held to be pro tanto a purchaser;[24] value was held to include marriage consideration,[25] mortgages by way of trust for sale were held to not be express trusts;[26] a claim by a charity was held to be "a claim by a person" within the meaning of Section 24, R.P.L.A. 1833.[27]

However, the 1833 Act was not free from all problems. Before 1833 the courts had not laid down a criterion for distinguishing constructive trusts from other trusts.[28] The 1833 Act did not provide a definition. Thus it was left to the later courts to work out where the distinction lay.

At first, naturally enough, the Courts attempted to base the distinction on the reason given for it by Grant M.R. in **Beckford v. Wade;**[29] that reason was the particular danger of staleness in old claims making out a constructive trust. The Courts therefore at first took the view that "express trust" meant a trust created by express words. From **Beckford v. Wade** later Courts developed the idea that they should not hear parol evidence to raise a trust after the limitation period had expired. In this way, it was reasoned that "express trust" meant a trust declared in writing.[30] The leading judgement on this view of the meaning of "express trust" in R.P.L.A. 1833, s.25 was that of Kindersley V.-C. who said in **Petre v. Petre**[31] that express trusts were:

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24. **A.G. v. Payne,** above.
25. **Petre v. Petre,** above.
26. **Kirkwood v. Thompson** (1865) 2 H. & M. 400.
27. **Magdalen College v. A.G.** above.
28. Brunyate, Limitation, 28.
29. Cited above.
30. The Statute of Frauds meant that, in practice, express trusts of land were declared in writing.
31. Cited above, at p. 393.

> "trusts expressly declared by a deed or a will or some other written instrument; it does not mean a trust that is to be made out by circumstances; the trustee must be expressly appointed by some written instrument".

This view of the meaning of "express trust" was also articulated clearly by Lord Cairns in **Cunningham v. Foot:**[32]

> "There must be a trustee in whom the land is vested; there must be an "express trust" by which I understand the legislature to mean a trust which arises upon the construction of the written instrument, not upon any inference of law imposing a trust on the conscience; a trust arising upon the words of the instrument itself. Therefore, these 3 things must concur; there must be land, there must be the trustee of the land and there must be the cestui que trust for whose benefit in this respect the land is to be held, and all that must be found upon the construction of the instrument with which you have to deal".

These statements enjoyed substantial support in the 19th century. However, as Brunyate[33] pointed out, the subsequent history of the law is a commentary of Kindersley V.-C.'s definition. Four specific points only require attention:

(i) Need for Writing

The idea that writing was necessary for an express trust persisted for many years after 1833. However, doubts subsequently arose because of decisions in cases unconnected with the R.P.L.A. 1833. After 1833, in cases not covered by the R.P.L.A. (e.g. claims to personalty or proceeds of sale) equity continued to mark the old distinction between express trusts (where the trustee could not rely on the Statute) and other trusts (where lapse of time was a defence). In this context, it was held that an "express trust" of personal property might be created either verbally or by conduct only.[34] This led to doubts whether writing was correctly required to consti-

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32. (1878) 3 App. Cas. 974.
33. Limitation, p. 100.
34. e.g. **Soar v. Ashwell** [1893] 2 Q.B. 390, 403.

tute an express trust of land.[35] Nevertheless, the Courts continued to repeat the old definitions throughout the 19th century when s.25 R.P.L.A. was directly in issue.[36]

(ii) "Clear Words"

Although an express trust had to be found "upon the construction of the instrument", it was held that the use of the word "trust" was unnecessary.[37] It seems ultimately to have been accepted that a trust might be express even where it had to be deduced from the terms of an instrument.[38]

(iii) Identity of Trustee

Although it was generally stated that the identity of the trustee must be found from the trust instrument,[39] nevertheless an exception was recognised in that a trustee de son tort was an "express trustee" for the purposes of section 25, R.P.L.A. 1833. Such a person is strictly no more than a constructive trustee. But it was settled that a trustee de son tort could not plead the Statute.[40]

(iii) Identity of Beneficiary

Clear statements were also made in some cases that the identity of the beneficiary must also appear on the face of the trust instrument of an express trust.[41] However, here too it was recognised that there were

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35. e.g. **Sands to Thomson** (1883) 22 Ch. D. 614.
36. **Price v. Phillips** (1894) 11 T.L.R. 86; **Toates v. Toates** [1926] 2 K.B. 30; cf. Brunyate, 53, 62, 101.
37. **Comrs. of Donations v Wybrants** (1845) 2 Jo. & Lat. 182, 189.
38. Lightwood, Time Limits, citing **Re Williams** [1897] 2 Ch. 12, 27.
39. **Petre v. Petre**, cited above;
    Cunningham v. Foot, above.
40. **Life Assoc. of Scotland v. Siddall** (1861) 3 D.F. & J. 58;
    Quinton v. Frith (1868) Ir. R.2 Eq. 416;
    Lyell v. Kennedy (1889) 14 App. Cas. 437, 459;
    Soar v. Ashwell [1893] 2 Q.B. 390;
    Price v. Phillips [1894] 11 T.L.R. 86.
41. e.g. **Cunningham v. Foot**, above.

exceptions, for in some circumstances, resulting trusts were held to be "express" for the purposes of the Statute. In **Salter v. Cavanagh,**[42] a will created a trust but did not dispose of certain surplus rents arising from the trust property. The surplus undisposed of was regarded as being an express rather than a resulting trust for limitation purposes.[43] This line of reasoning seems, however, only to have been applied where a trust affecting the land had actually been created by an instrument, but where the identity of the beneficiary was pointed out by the law by way of what would normally be described as a resulting trust.

Resulting trusts arising in any other way were not regarded as being express trusts for limitation purposes.[44]

The R.P.L.A. 1833 - express trusts - summary and conclusions

The Statute of 1833, dealing with claims to recover land, followed earlier practice and distinguished between express trusts (where time could not run in favour of a trustee) and implied, resulting or constructive trusts (where time might run in the trustee's favour). The aim of the Statute in this area appears to have been to draw a balance between, on the one hand, the need to safeguard the interests of the beneficiaries by refusing the limitation defence and, on the other hand, to promote the policy objectives of the law of limitations, by allowing it.

The precise boundaries between the two categories of trust were left to be determined by the Courts. In allocating trusts to the statutory categories, the Courts did not adopt a doctrinaire approach.[45] Nor was their approach arbitrary or irrational.[46]

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42. (1838) 1 Dr. & War.. 668; doubted (Sugden), **Cmrs. of Donations v Wybrants** (1845) 2 Jo. & Lat. 182; cf. Sugden, Real Property Statutes, 2nd.
43. See also **Patrick v. Simpson** (1889) 24 Q.B.D. 128.
44. See Lightwood, Time Limits, 74.
45. **Soar v. Ashwell** [1893] 2 Q.B. 390, Kay C.J.
46. cf. Brunyate, 102.

In the case of claims to recover land, the Courts seem in fact to have consistently attempted to reconcile the two conflicting principles which the Statute attempted to balance. The Courts attempted to do this by adopting generally a strict definition of the meaning of "express trust".[47] But this strict definition was modified or extended to include (in certain circumstances) trusts which would normally be regarded as constructive or resulting.[48] The aim behind this extension seems to have been to disallow (as far as possible) the limitation defence to persons who had themselves taken the control of management of property for the benefit of others. In these circumstances it was thought unfair to allow a plea of limitation. But, in the case of land claims, this extension was only permitted where the existence and terms of the trust could be found with reasonable ease and certainty, and (more or less) without reference to oral evidence. The line of demarcation which the Courts drew between express and constructive trusts was therefore (as indicated above) pragmatic, highly sophisticated (and favoured the policy of limitation at the expense of beneficiaries) but it was not doctrinaire or irrational.

It is perhaps just worth stating expressly, since one leading commentator (Brunyate) has expressed the opposite view, the writer's own opinion that before 1939 the Courts never actually abandoned the definitions of "express trust of land" stated in **Petre v. Petre** and **Cunningham v. Foot** (cited above).

It is quite true that in the second half of the 19th Century, the Courts adopted a different definition of express trust for claims to personalty; it seems quite likely that that definition was used in all cases where R.P.L.A

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47. **Petre v. Petre**, above;
Cunningham v. Foot, above;
Dickenson v. Teasdale (1862) 1 DeG.J. & S. 52, 59.
48. **Soar v. Ashwell** above.

1833 ss.24 and 25 were not in issue. But it seems to the present writer that, in cases where those sections were directly raised, the Courts continued to apply the old definitions of "express trust" in claims to recover possession of land throughout the 19th century and indeed until the sections were repealed by the Limitation Act 1939.

The later definition of "express trust" adopted in claims to e.g. personality was considerably more relaxed. For example, writing was not required; and many types of constructive trust were included. This development must not be ignored, for this meaning of "express trust" was, ultimately, read into the limitation provisions of the Trustee Act 1888. And in the next section of this thesis, the writer suggests that the basis of the modern law may still be found in that Act, and that decisions made in relation to it might still be relevant.

III. Limitation Act 1980

The whole of the R.P.L.A. 1833 was repealed by the L.A. 1939. Section 25 was not re-enacted. Instead, quite different provision was made for actions to recover land held on trust.

The current rules are contained in the Limitation Act 1980, ss. 18 and 21. Section 18 continues the idea of assimilating equitable claims to recover land to legal claims.

It provides that a right of action to recover land shall (for the purposes of the Act) be treated as accruing to a person entitled in possession to an equitable interest at the same time and in the same circumstances as it would if his interest were a legal estate in the land. The statutory "deemed accrual" code applies. In consequence, time runs against future beneficial interests only from the moment when the interest falls into possession by the determination of the preceeding estate or interest. But the straightforward operation of section 18 is greatly restricted by the provisions of section 21.

That section provides that no limitation period fixed by the act shall apply to an action by a beneficiary under a trust, being an action -

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy; or

(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.

Subject to these exceptions, the normal 12 year limitation period applies to claims to recover trust land.

A number of points arise from these statutory provisions.

(a) To what trusts does section 21 apply?

It will be recalled that the 1833 legislation drew a fundamental distinction between express and other trusts. It is widely believed that this distinction was abandoned in 1939. The current Act defines trust and trustee by reference to the Trustee Act 1925. In that Act "trust" extends to include implied and constructive trusts and "trustee" includes personal representatives. This definition, of course, applies throughout the L.A. 1980, but only where the context does not otherwise require.

Most works on the law of trusts accept, almost without qualification or discussion, that this wide definition is applicable in section 21 to actions to recover trust property and always prevents all types of trustees in possession from relying on the Statute.[49]

This general attitude is rather surprising when the antecedents of the section are considered. It is clear that it is not enough simply to have regard to the statutory definitions of "trustee" and "trust".

The current provision can be traced back through section 19 of the 1939 Act to its origin, which is to be found in section 8 of the Trustee Act 1888. There are only minor differences in wording, which have been held not to affect a comparison.[50]

The 1888 Act included, in the general definition of "trustee", implied or constructive trusts, thus using language similar to that incorporated in the 1980 Act. But under the 1888 Act, the courts held that some cons-

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49. Hals. Laws, 4th ed., Vol. 28, 833, 842, 853; Underhill, 13th ed., 733; Lewin, 16th ed.., 708; Snell, 27th ed., 279, 280; Hanbury and Maudsley, 11th ed., 657; and see also **Re Jarvis** [1958] 1 W.L.R. 815.
cf. Lightwood, Time Limits.
50. **Re Howlett** [1949] Ch. 767, 777; cf. **Tito v Waddell** (No. 2) [1977] 2 All E.R. 129; Franks, Limitations, 75.

structive trustees could nevertheless rely on the Statute.[51] The courts achieved this result, not by ignoring the statutory definition of "trustee", but by construction of the words "trust property" and "retained by the trustee", (now rendered as, "in the possession of the trustee").

It was held by the Privy Council in **Taylor v. Davies,**[52] (dealing with equivalent Ontario legislation) that having regard to antecedent English decisions on the meaning of "express trust", the expressions cited above only applied to the case of a person who took possession on trust on behalf of others. They did not apply to the case of a person who took property on his own behalf, but who was nevertheless liable to be declared a constructive trustee by the Court, e.g. such as a fiduciary purchasing trust property, or a purchaser or a volunteer with notice.

> "In other words, they refer to cases where a trust arose before the occurrence of the transaction impeached and not to cases where it arises only by reason of that transaction. The exception ... does not apply to a mere constructive trustee".[52]

Two reasons were given in **Taylor v. Davies** for this construction; the second is the more important for the present thesis. It was said that if constructive trustees were not allowed to plead the statute then:

> "The section, which was presumably passed for the relief of trustees, has seriously altered for the worse the position of constructive trustees and (to use the words of Sir Wm. Grant in the case above cited)[53] a doctrine has been created which may be "fatal to the security of property".[54]

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51. **Taylor v. Davies** [1920] A.C. 636, P.C.;
Clarkson v. Davies [1923] A.C. 100, P.C.;
Re Eyre - Williams [1923] 2 Ch. 533;
cf. the earlier cases of **Re Lands Allotment Co.** [1894] 1 Ch. 616, CA; **Re Robinson** [1911] 1 Ch. 502; **Wassall v. Leggatt** [1896] 1 Ch. 554.
52. Cited above. It is not thought that the decision in **Re Landi** [1939] Ch. 828 - viz. that a trust created by Statute will prevent time running - affects the reasoning in **Taylor v. Davies.**
53. **Beckford v. Wade,** cited above.
54. [1920] A.C. 636.

It can thus be seen that under the 1888 Act the courts continued, for the old reasons, to have regard to the distinction between express and at least some types of constructive trust.

Section 8 of the 1888 Act set the pattern for the rule which formed section 19 of the 1939 Act and is now to be found in section 21 of the 1980 Act. Since both the 1939 and 1980 Acts were consolidating enactments (in the case of the 1939 Act, with amendments), it might be thought that the distinction drawn in **Taylor v. Davies** remained good law after 1939. There is one decision that it did.[55] However, as indicated above, most commentators[56] assume that time cannot run in favour of any type of constructive trustee in possession.

The statement in Halsbury's Laws is typical of this approach:

> "If ... trust property is wrongfully conveyed to a purchaser for value with notice of the trust, the purchaser becomes a constructive trustee of the property and the beneficiary's right to recover the property against the purchaser, or anyone claiming under him as a volunteer or with notice, will not be barred by lapse of time so long as the person against whom the claim is made is in possession of the trust property".[57]

Probably the reason for this widespread assumption is to be found in the Fifth Interim Report of the Law Revision Committee,[58] which preceded the 1939 consolidation.

In that report, the Committee recommended that:[59]

> "the exception in section 8 of the Trustee Act 1888 should be expressly made to extend (emphasis supplied) to trustees whether holding on express or constructive trusts ..."

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55. **Tintin Exploration Syndicate v. Sandys** (1947) 177 L.T. 412; see also **Re Jarvis** [1958] 1 W.L.R. 815.
56. See note 49.
57. 4th ed., vol. 28, para. 853.
58. (1936) Cmnd. 5334.
59. p. 17.

This recommendation of the Committee's was highly unsatisfactory. No reason was given for it, except the statement that:

> "It is difficult to find any real justification for the rule that an executor or other person holding property as a trustee, but not on an "express trust", can plead the Statute".[60]

This is really rather a remarkable statement from a group which included an eminent Chancery specialist: since neither **Beckford v. Wade** nor **Taylor v. Davies** was referred to, it is impossible to know if the Committee disapproved of these decisions and the reasoning on which they were based, or had merely overlooked them.

Whatever the reason, the Committee's Report had an effect. For most commentators (as indicated above) seem to have assumed that the 1939 Act did what the Committee had recommended it should. This, however, is debatable. The Act certainly did not do **precisely** what the Committee had recommended, which was that the point should be dealt with "expressly". The Act, in fact, leaves the point just as obscure as is possible. Accordingly, whilst the weight of opinion[60] seems to favour the view that section 21 applies to all property held by all types of trustee, the position is by no means absolutely clear. The present writer believes that if the point were fully argued, **Taylor v. Davies** might be found to be still good law. An attempt will be made to assess the practical merits of the competing views when the effect of the rules is assessed (below).

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60. Writers on Limitations are more cautious than writers on trusts on this point, but are not in agreement. Lightwood thought that all constructive trustees were outside T.A. 1888, s.8, but he wrote before the decision in **Taylor v. Davies.** Preston & Newsom treat **Taylor v. Davies** as still effective, but confine it to cases of receipt of property by a fiduciary where there is no prior declared trust. Franks, Limitations, (1959), discusses the position but thinks all constructive trustees ought to be outside the statute on grounds of fairness to beneficiaries. **Taylor v. Davies** is given fullest effect in Canada; Williams, Limitation in Canada, 2nd ed., Butterworths, (1981).

(b) Resulting Trusts

Before 1939, a distinction was drawn between various types of resulting trust (see above). It seems that all resulting trusts are now within L.A. 1980, s.21.[61] On the other hand, where the person in possession enters under a purported disposition which, for some reason, is in fact ineffective to pass any title, there is no question of trust and time will run immediately[62] on accrual of a cause of action.

(c) Fraud

Section 21 expressly excepts actions in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy. The meaning to be attached to this proviso is obscure; it is not clear whether fraud requires dishonesty;[63] the meaning of "party or privy" is also doubtful.[64] It is not clear whose fraud is relevant. In **Thorne v. Heard**[65] it was said that the fraud must be the fraud of, or in some way imputable to, the person invoking the statute. But in the more recent case of **Baker v. Meday Building Supplies,**[66] Danckwerts J. held that an innocent recipient of property would be tainted by fraud of the trustee from whom the property came.

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61. Franks, 71, 72.
62. **Magdallen Hospital v Knotts** (1879) 4 App. Cas. 324;
Churcher v. Martin (1889) 42 Ch. D. 312;
Re Lacy (1879) 2 Ch. 149;
Re Ingleton Charity [1956] Ch. 585.
cf. **Re Clayton's Deed Poll** [1979] 2 All E.R. 1133;
Hyde v. Pearce [1982] 1 All E.R. 1029.
63. **Collings v. Wade** [1896] 1 Ir. R. 340; cf. In **Re Sale Hotel** (1897) 77 L.T. 681; reversed on another point, (1898) 78 L.T. 368.
See also **Thorne v. Heard [1894] 1 Ch. 599; Re Lands Allotment Co.** [1894] 1 Ch. 616.
64. Franks, 75.
65. Cited above, at p. 506
66. [1958] 2 All E.R. 532, reversed on appeal on other grounds; noted, F.R. Crane, (1958) 22 Conv. (N.S.), 390.

(d) Laches

It is traditionally said that where there is a Statute of Limitations:

"laches does not apply until the expiration of the time allowed by the Statute".[67]

The doctrine is therefore confined to cases in which there is no statutory bar. It is not clear, however, whether L.A. 1980, s.21 ought to be regarded as a case in which there is a specific statutory rule, so that laches cannot apply, or as a case in which there is no statutory bar, so that laches can operate. There are adherents to both views. In favour of the former,[68] it might be said that if perpetual liability is the policy of the legislature,[69] to apply the doctrine of laches would defeat the policy. In favour of the latter,[70] it might be pointed out that perpetual liability is highly undesirable and that the doctrine of laches is flexible enough to allow substantial justice to be done in the circumstances of any particular case.

On the authorities, the better view seems to be that where the statute provides that no limitation period shall apply to a claim against a trustee by a beneficiary, then that claim cannot be barred by simple laches i.e. laches meaning simply delay on the part of the beneficiary. But it seems to be otherwise where there has been acquiesence or, probably, gross laches

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67. **Archbold v. Scully** (1861) 9 H.L.C. 360 at 383;
Re Pauling [1961] 3 All E.R. 713, 735,
approved [1963] 3 All E.R. 1 at p. 20, C.A.
68. Snell, 27th ed., 279, 280; 28th ed. 290;
Preston & Newsom, 3rd ed., 262.
69. But query whether it was, in the light of the Law Reform Committee's assumption that laches is a defence available to a trustee in possession; see next note.
70. Franks, Limitation, 260;
Law Reform Committee, 21st Report, 3.82 - 3.84.

on the part of the beneficiary,[71] which, in this context, by analogy, may mean a delay for longer than the equivalent statutory period.

(e) Co-ownership

Before 1926, time could run in favour of a co-owner who enjoyed more than his rightful share of the land or of rents or profits.[72] But after 1925, beneficial co-ownership can take effect only in equity behind a trust for sale. It was held by the Court of Appeal in **Re Landi**,[73] that the effect of the imposition of the statutory trusts on beneficial co-owners brought into operation the rule that time cannot run in favour of a trustee.

In that case, one of two tenants in common was in exclusive possession of the premises in question from the end of 1923 until May 1935. It was held in the Court of Appeal that from the moment the L.P.A. 1925 came into effect, the character of the possession changed. It then became the possession of a trustee, and without going into details, Sir Wilfrid Greene M.R. merely pointed out that no Statute of Limitations could run in favour of a trustee.

The debate in **Re Landi** and subsequent commentaries[74] have centered on the question of the meaning and effect of s.12 of the L.P.A. 1925. That section provides:

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71. Hals Laws, 4th ed., title 'Limitation', para 836, n.3;
Baker v. Read (1854) 18 Beav. 398;
Bright v. Legerton (No. 1) (1861) 2 De G.F. & J. 606;
Thomson v. Eastwood (1877) L.R. 2 App. Cas. 215, 236;
In **Re Cross** (1882) 20 Ch. D. 109, 121;
Rochefoucauld v. Boustead [1897] 1 Ch. 196;
Rix v. Rix (1912) 56 Sol. Jo. 573;
Re Jarvis [1958] 1 W.L.R. 815;
Re Pauling [1961] 3 All E.R. 713; (1963) 3 All E.R. 1.
72. R.P.L.A. 1833, s.12;
Paradise Beach v. Price-Robinson [1968] A.C. 1072.
73. [1939] Ch. 828.
74. Goodman (1965) 29 Conv. (N.S.) 365; cf. Battersby (1971) 35 Conv. (N.S.) 6.

> "Nothing in this part of this Act affects the operation of any Statute or of the general law for the limitation of actions or proceedings relating to land".

It was argued that this meant that that possessor's statutory trusteeship was to be ignored, and so consequently, that time had run. But this argument was rejected.

The position has been exhaustively analysed by Goodman[75] and Battersby[76] and requires no further attention here. For present purposes it is sufficient to note that, having stood for over 40 years and in the light of the consolidation of the limitation legislation in 1980, it seems extremely unlikely that the decision in **Re Landi** would not be followed; the case can therefore be regarded as good authority that the statutory trusts are trusts which fall within L.A. 1980, s.21.[77]

If this is correct, then it would seem that time can now never run where the same persons are co-owners in equity and trustees at law. Moreover, time can never now run in favour of any co-owner, whether or not he is a trustee. Even if the equitable co-owner in possession is not a trustee, he will be caught by L.A. 1980, sched. 1, para. 9 - time cannot run in favour of a beneficiary under a trust for sale unless he is solely and absolutely entitled. The result is that the statute cannot now operate to quiet possession as between beneficial co-owners.

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75. Cited above.
76. Cited above.
77. See **In re Milking Pail Farm Trusts** [1940] 1 Ch. 996, 999; Franks, Limitation, 177, n.

Claims against Trustees - Assessment

In this concluding section, the particular rules dealing with the limitation of actions to recover land from trustees are measured against the general objectives of the law of limitations. The three aims traditionally ascribed to the Statute (viz., the need to avoid litigation on stale claims; the desire to encourage prompt action by plaintiffs; and to avoid hardship to defendants) together with a fourth objective identified in this thesis as the desire to simplify and expedite investigation of title in unregistered conveyancing, are considered in turn in relation to express, resulting and constructive trusts.

1. Express Trusts

The present legislation, which in effect inflicts unlimited liability (in point of time) on trustees, is undoubtedly tender towards the interests of beneficiaries. This result seems to be achieved - at least in the case of claims against express trustees - without noticeably obstructing the general objectives of the law of limitations.

Staleness ought, in theory, rarely to prejudicially affect a defendant who is an express trustee of land. Since the L.P.A. 1925 requires that a declaration of trust of land must be manifested and proved by writing,[78] which must contain all the material particulars of the trust[79] then, in theory, there ought rarely to be cases in which a defendant trustee could be prejudiced by the staleness of evidence offered by a plaintiff. Difficult cases might no doubt occasionally arise on a question of construction - any one or more of the "3 certainties" required of a trust could give rise to difficulties. But questions of construction are not necessarily affected by staleness, except perhaps in cases where extrinsic evidence is admissible.

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78. Section 53(1) (b).
79. **Smith v. Mathews** (1861) 3 De G.F. & J. 129.

Unfairness or hardship to defendants will rarely be an issue when even an old claim is made to recover property from an express trustee. A person who has taken the control and management of property for the benefit of another can scarcely complain if that other seeks to enforce his rights, even after the lapse of many years.

It is of course possible to imagine circumstances in which an old claim against an express trustee might in fact be unfair. An individual can, for instance, find himself constituted an express trustee without his having given any real informed consent. For example, the statutory trusts imposed in cases of beneficial co-ownership may and often do constitute an individual a trustee without that person understanding the nature and duties of his trusteeship.[80] It is also quite conceivable that in some such cases hardship might be caused to a defendant trustee who might have changed his position in reliance on a reasonable belief in his own ownership. Nevertheless, although it is conceivable that in some cases, hardship might be caused to an express trustee by the absence of any fixed limitation period, the writer would suggest that much greater hardship would be caused to beneficiaries if a fixed and universally applicable limitation period was always available to express trustees, irrespective of actual hardship. In any event, in many cases in which hardship is caused to an honest and reasonable express trustee by an old claim, the trustee may well be able to rely on some defence other than limitation e.g. acquiesence, estoppel or, probably, gross laches.

Diligence. The present statutory rules do nothing to encourage plaintiffs to prompt action. But general doubts were raised in Chapter 1 of this thesis about the importance of this policy. In any event, there seems

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80. Consider, e.g. **Re Landi**, cited above; and **Re Howlett** [1949] 2 All E.R. 490.

to be other, quite adequate, reasons for a plaintiff with knowledge of his rights, to take prompt action against a trustee who is treating trust property as though it were his own.

Since, in each of the following sections, the issue of diligence is precisely the same, it will not be specifically dealt with again.

Conveyancing. In this thesis, the writer has suggested that the Statute may beneficially affect conveyancing practice in 2 ways. First, the Statute provides a qualified guarantee to anyone investigating title to land that certain rights which might be concealed behind a good root of title at least 15 years old can no longer be enforced. Second, the Statute may on occasion be relied on to clear off an old but discoverable defect on a paper title. The special limitation rules which prevent time running in favour of a trustee in possession do not seem to the writer to greatly affect the achievement of either of these objectives. It is necessary to deal with each in turn.

Pre-root or concealed defects

The limitation rules which prevent time running in favour of a trustee in possession of land necessarily cease to operate, so far as third parties are concerned, at the moment the trustee parts with possession, e.g. by an unauthorized disposition. Time can run against beneficiaries from that moment. Since the minimum length of the limitation period is shorter than the minimum period for proof of title under an open (and most express) contracts, a purchaser investigating title from an apparently good root at least 15 years old, will not usually need to concern himself with the bare possibility that the grantor in the instrument which forms the root, or some earlier link in the title, was an express trustee who was wrongfully in possession of the property. Sufficient time will have elapsed since the trustee went out of possession for the minimum limitation period of 12 years to have expired against the beneficiaries.

It is true, of course, that this minimum period is only an effective protection against beneficiaries entitled to present interests and not under any disability at the moment that their express trustee ceased to be in possession. It is possible, therefore, that time may not have run against any beneficiary entitled only to a future interest or under a disability. The last paragraph also assumed that the person who took the property from the trustee, took without notice of the trust. If the grantee from the trustee took with notice, he will have constituted himself a constructive trustee and it is probable (although by no means certain) that time cannot run in favour of such a constructive trustee. It is also possible (although even less certain) that time might not run, even in favour of an innocent recipient, if the trustee acquired and disposed of the property fraudulently.[81]

However, in most cases, these remote possibilities can be discounted. The reason is of course that a bona fide purchaser of a legal estate for value without notice takes free from equitable interests which are not registrable. A bona fide purchaser, therefore, of a legal estate (derived originally from an express trustee) who takes for value and without notice of any prior equitable interests under those express trusts, takes free from those interests. No one falling within this category will therefore need any protection from the Statute against outstanding equitable interests. Such purchasers are in fact protected against equities concealed behind a good root of title not by the Statute of Limitations, but by L.P.A. 1925, s.44 (1), as amended by section 23 of the 1969 Act, which fixes (subject to agreement to the contrary) the period for proof of title; and by L.P.A. 1925, s.44 (8) which provides that a purchaser shall not be affected by notice of anything prior to the period of commencement of title, unless he actually investigates.

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81. **Baker v. Medway**, etc., discussed above.

One qualification, however, needs to be stated to cover the case where the "concealed" trustee in question was a tenant for life under a settlement governed by the S.L.A. 1925. Two situations must be distinguished. First, if no vesting deed had been executed, the tenant for life will not normally have had a legal estate vested in him; he cannot of course pass something he has not got. No later plea of bona fide purchaser could therefore prevail against the beneficiaries under the Settlement.

Secondly, if a vesting deed had been executed, S.L.A. 1925 s.18, will avoid any unauthorized disposition by the tenant for life and so prevent a legal estate passing to any grantee by virtue of the unauthorized disposition. Again, no plea of bona fide purchaser would succeed.

"Defects on the title"

Since time cannot run in favour of an express trustee, the Statute of Limitations has no role to play in removing old defects, where the "defect" in question is an express trust discoverable on investigation of title. This is no great loss to anyone, since beneficial interests under express trusts are normally overreachable.[82]

2. Resulting Trusts

Staleness may, in some circumstances, prejudicially affect a defendant alleged to be holding land on resulting trust, if no limitation period is available. This will probably not be the case in the type of resulting trust which occurs when a grantor conveys to an express trustee (named as such), but apparently fails to dispose of his whole beneficial interest. This situation may give rise to problems of construction of the conveyancing instrument, but the quality of the evidence available outside the instrument, will not usually be directly relevant. On the other hand, staleness may be an important factor where a resulting trust is alleged to have arisen

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82. Bare trusts of course being an exception.

on a purchase of land in the name of someone other than the purchaser, or in the case of a purchase in the joint names of the purchaser and another. In such cases, parol evidence is admissible to establish who in fact advanced the purchase money;[83] the quality of that evidence may be all important.

There is a second way in which the quality of parol evidence may be crucial to establish a resulting trust. The presumption of resulting trust, once raised, yields to a contrary intention that the "trustee" should take beneficially.[84] Parol evidence is admissible to prove an intention contrary to the presumption.[85]

The result, at least in theory, is that a claim to make out a resulting trust can be made without limit of time, so long as the alleged trustee retains possession. Clearly, a defendant alleged to be a resulting trustee might be prejudiced by the loss or destruction of evidence with which to defend himself. In practice, however, stale claims are unlikely to succeed. As Professor Pettit points out:

> "the presumption of resulting trust naturally weakens with the passage of time - at any rate if there has been acquiesence or where the person in whose name the property has been purchased is allowed to remain in possession".[86]

Fairness; it seems likely that long-delayed claims to make out a resulting trust will rarely result in unfairness to the alleged resulting trustee. Long-delayed claims will rarely succeed (see above). Further, it seems likely that a defendant in such a case will normally be entitled to rely on some other defence such as acquiesence or estoppel.

Effect on conveyancing practice: the position here is broadly similar to that outlined in the previous section which dealt with express trusts.

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83. **Heard v. Pilley** (1869) 4 Ch. App. 548.
84. **Re Davison's Settlement** [1913] 2 Ch. 498.
85. Pettit, Equity, 4th ed., 110.
86. Equity, 4th ed., 110, citing **Groves v. Groves** (1829) 3 Y. & J. 163.

Where the alleged trustee disposed of the property in a transaction concealed behind the root of title, time will have run against any claimant. But such protection is scarcely required by third parties (such as purchasers investigating title) and the rule has, in this context, no influence at all on conveyancing practice. Even if a resulting trustee has held the property within the last 12 years, a bona fide purchaser of a legal estate for value without notice will take free from the claimant's equitable rights.[87]

3. Constructive Trusts

This section deals in turn with 4 specific types of trust usually categorized as being constructive trusts.

a. The vendor under a contract for sale of land.

The statutory limitation rules do not apply to a vendor constituted a constructive trustee in equity. This trusteeship depends on the availability of specific performance to a purchaser. The time limits imposed by the 1980 Act for actions founded on a contract do not apply to claims for specific performance. However, the doctrines of laches and acquiesence do enable the Court to have regard to problems such as, e.g. staleness and change of position, when there is delay in asserting a claim to specific performance. Further, third parties such as later purchasers of the property, are protected by other means; not by limitation or the doctrine of notice, but (in the case of unregistered land) by the provisions of the Land Charges Act 1972 which make "estate contracts" registrable and avoid as against a purchaser of a legal estate for money or monies worth, any which are not in fact registered.

b. The rule in Keech v. Sandford [88]

It is trite law that a trustee who renews a lease of trust property

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87. **L.P.A.** 1925, s.199; s.44(5).
It is conceivable that a purchaser investigating title might in some cases receive notice from e.g. a recital in an abstracted document of title.
88. (1726) Sel. Cas. Ch. 61.

in his own name will be treated as a constructive trustee of the renewed lease.

It is not at all clear, however, what limitation rule applies in such cases.

There are 3 possibilities.

(a) The general, statutory period is applicable, with no special provision being made because of the trust. This seems to have been the position before the 1939 Act came into force.[89] **Taylor v. Davies**[90] suggests, by no means conclusively, that this is still the position.

(b) The second possibility is that no statutory limitation period is applicable - i.e. that L.A. 1980 s.21 applies and prevents time running while the property is in the possession of the alleged constructive trustee.

(c) The third possibility is that no statutory period prescribed by the Act is applicable, but the doctrine of laches applies. In this context it is worth noting that in **Re Jarvis,**[91] Upjohn J. assumed, without discussion or reasons, that the doctrine of laches was applicable to a claim based on **Keech v. Sandford.** Unfortunately, it is not clear whether in **Re Jarvis,** the predecessor of section 21 was overlooked or if the case was assumed to fall within the section, but that nevertheless laches applied.[92]

In view of the uncertainty the following comments, dealing with the merits of the alternative rules, treat the question as open.

Staleness. If time can run under the Statute in favour of a person constituted a trustee under the rule in **Keech v. Sandford,** then quite clearly the possibility of old claims being litigated on stale evidence is much reduced. However, the danger of staleness is not in fact particularly great where an express trustee has renewed a trust lease for his own benefit.

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89. **Petre v. Petre** (1852) 1 Drew. 393; **Re Dane's Estate** (1871) Ir.R.5Eq.498.
90. Discussed above.
91. [1958] 1 W.L.R. 815.
92. It was pointed out (above) that it may be that where section 21 does apply, laches cannot be pleaded.

Once the express trust is made out, it remains only to prove the renewal of the lease. There is little material, therefore, which could be prejudiced by staleness.

There is undoubtedly a greater danger of staleness where an express trustee or other fiduciary is alleged to have acquired the freehold of property let to the trust. In this situation, the traditional rule is that the reversion is held on constructive trust only if the fiduciary obtained his opportunity to purchase because of his trusteeship, or if the lease is renewable by custom.[93] There is clearly a greater danger of stale evidence if issues of opportunity and custom have to be investigated.

There is also a very considerable danger of staleness where it is sought to make out a constructive trust against persons such as mortgagees and, it seems, partners,[94] having a special but not fiduciary duty. Such persons are subject:

> "only to a rebuttable presumption (of trusteeship). Thus if such a person can show that he did not abuse his position, he can retain the benefit of the lease".[95]

Investigating an issue such as abuse of position on the basis of old evidence, is a dangerous process.

Hardship. If no fixed limitation period is available, then there is clearly some danger that an old claim to recover land from a person alleged to be a constructive trustee by virtue of the rule in **Keech v. Sandford** might cause hardship to that person. The rule in **Keech** is so strict that it is perfectly possible for it to be broken:

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93. **Phillips v. Phillips** (1885) 29 Ch. D. 673;
Re Bliss [1903] 2 Ch. 40, C.A.;
Griffith v. Owen [1907] 1 Ch. 195.
94. cf. **Thompsons Trustee v. Heaton** [1974] 1 W.L.R. 605.
95. Oakley, Constructive Trusts.

"without any breach of morality, without any wrong being inflicted, and without any consciousness of wrongdoing".[96]

In these circumstances, where a claim might be harsh even if brought **within** the limitation period, it seems indisputable that grave hardship might on occasion be caused by an unbarred old claim.

It is true that this harshness is to some extent alieviated by the rules that a person held to be a constructive trustee under **Keech v. Sandford** is entitled to a lien on the property for the expenses of renewal[97] or the costs of permanent improvements[98] or, conceivably, an allowance for time, skill and energy expended for the benefit of the premises.[99] Nevertheless, these rules do not fully protect the constructive trustee from hardship. The trustee loses profits, any increase in the value of the premises, and will normally have to pay rent for any period of beneficial occupation.

However, it must be pointed out that even if a constructive trustee cannot rely on the Statute, he may nevertheless have other defences available to him e.g. acquiesence or estoppel. But those defences depend, unlike a plea of the Statute, upon the conduct of the plaintiff as well as the position of the defendant. These defences, for example will, not be available against a defendant ignorant of his rights.

Laches. If the Statute cannot be pleaded to a claim based on **Keech v. Sandford,** it is probable (question discussed above) that the doctrine of laches is relevant. Laches, of course, is a flexible doctrine, not tied to any specific period of years. And certainly, the risk of staleness and the danger of hardship to the defendant can be taken into account when laches is in issue. It is arguable therefore that the result produced by applying

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96. **Bray v. Ford** (1896) A.C. 44, referring generally to the rules governing abuse of fiduciary position.
97. **Re Lord Ranelagh's Will** (1884) 26 Ch. D. 590.
98. **Mill v. Hill** (1852) 3 H.L. Cas 828.
99. cf. **Re Jarvis** [1958] 2 All E.R. 336.

the doctrine of laches is likely to be fairer to the parties actually before the court than any fixed rule could be.

Conveyancing implications. The fact, if it be the case, that no statutory limitation period applies to a claim to make out a trust under **Keech v. Sandford,** has little consequence for third parties investigating title to the land.

(i) Renewed lease. If a constructive trustee has e.g. assigned the lease in question, the assignee may well be able to rely on the bona fide purchaser rule. In practice, it is thought that in such a case a proper investigation of title would only rarely reveal the trust, so that a plea of a bona fide purchaser will usually be available against this type of defect in title.

(ii) Purchase of reversion. Here again, a plea of bona fide purchaser will normally provide much greater protection against claims by beneficiaries than the Statute. In practice, however, a constructive trust of a freehold reversion is probably more likely to be discovered than a constructive trust of a lease. For example, if the sole vendor (an apparently beneficial owner) under a contract of sale of a freehold is also an express trustee of a lease of the same property, the problem will be revealed at once.

From the conveyancing point of view, there would be some advantage if the Statute did apply in such circumstances. If the Statute could be pleaded to a claim made by virtue of **Keech v. Sandford,** the advantage for anyone proving or investigating title would be that it would be possible to say with certainty whether or not time had run and the defect in title had been cured. Of course, if the Statute cannot be pleaded (because of L.A. 1980, section 21) in such cases, then probably laches can be. But in this context, the disadvantage of laches is that it does not operate with the same degree of certainty as the Statute; the doctrine of laches

will rarely enable anyone investigating a title to say positively whether a potential claim under **Keech v. Sandford** is or is not a real threat to the security of that title. It is conceivable, therefore, that in a few cases, where such a defect is discovered on investigation of title, the defect will turn out to be irremediable - e.g. because the beneficiaries cannot be ascertained or traced - with the result (if the Statute is not applicable) that the land will be rendered practically unmarketable. This is clearly undesirable. On the other hand, if the Statute were held fully applicable to claims based on **Keech v. Sandford**, then it might operate unfairly and to the prejudice of claimants in equity who might be deprived of a remedy without having had any opportunity to assert it. There is no obvious solution to this dilemma. However, the writer believes that, given the opportunity, a modern court would be more likely to prefer the interests of the beneficiaries to claims based on conveyancing sense, to reject any argument based on **Taylor v. Davies** and decide that L.A. 1980 section 21 applies to all types of trust without distinction so that time can never run under the Statute in favour of any trustee.

c. Purchase by a fiduciary of trust property

A fiduciary purchasing trust property is liable to have the purchase set aside if the beneficiaries choose to object. Again, unfortunately, it is not easy to state with certainty the modern limitation rules which govern such applications.

The possibilities are:

(i) that the ordinary statutory period applies and so time can run; or

(ii) that the ordinary rule is excluded by L.A. 1980, s.21, so that time can never run under the Statute whilst the fiduciary retains the property;

or

(iii) that the Statute is wholly irrelevant and the matter is governed by laches.

Each possibility requires amplification:

(1) The ordinary statutory period applies. It is arguable that the decision in **Taylor v. Davies** (discussed above) continues to be authority for the proposition that L.A. 1980, s.21 (the special rule preventing time running in favour of a trustee) does not catch this species of constructive trust.

Taylor v. Davies was in fact a case dealing precisely with the purchase of trust property by a fiduciary. The respondent in the case was in a fiduciary relation to the the appellants and was disqualified from purchasing the property in question without making full disclosure, giving full credit and obtaining consent. It was held, assuming that he had failed to satisfy these conditions, that the Limitations Act (R.S. Ont., c.147, in the same terms as the English Trustee Act 1888) was a defence. It was held that the statute only applied:

> "to cases where a trust arose before the occurrence of the transaction impeached and not to cases where it arises only by reason of that transaction".[100]

To summarize, it is arguable that fiducaries who have purchased trust property are not caught by L.A. 1980 s.21 (1), at least where they were not previously express trustees.[101]

(ii) No statutory period. This second possibility is that L.A. 1980 s.21 applies with full force and prevents time running. This possibility requires the decision in **Taylor v. Davies** to be rejected. There is no direct authority on this point, although in two cases decided **before Taylor**, the pre-

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100. [1920] A.C. 636, at p. 653.
101. It is conceivable that the decision in **Taylor v. Davies** (even if followed) would be confined to its own facts - viz., to purchase by a fiduciary **other than** an express trustee. See **Chettiar v. Chettiar** [1935] A.C. 163; cf. **Tito v. Waddell** [1977] 2 ALL E.R. 129, 246.

decessor of L.A. 1980, s.21 seems to have been applied.[1] However, it was pointed out (above) that **Taylor v. Davies** is rarely referred to in later English decisions or in text books and its status is obscure.

(iii) The third possibility is that the Statute is wholly irrelevant and that only the doctrine of laches applies. The basis of this argument is not clear. The writer has not been able to find any decision or text which explains it. Nevertheless, it does occassionally appear to have been asserted that section 21 does not apply to this particular type of constructive trust and that only laches is relevant.

This view is stated most clearly in a note in Halsbury's Laws:[2]

> "an action by a beneficiary to set aside a purchase by a trustee of the trust property ... is subject only to the limitation imposed by the equitable doctrine of laches".

However, the only authority cited for this proposition is a statement (obiter) by Megarry V-C. which is tucked away in the recesses of **Tito v. Waddell:**[3]

> "... English textbook writers of repute have continued to treat actions by a beneficiary to set aside purchases by trustees, whether of the trust property or of a beneficiary's interest, as being governed not by any statutory period of limitation but by the equitable doctrine of laches ... see e.g. Lightwood, Time Limits, 263/66; Brunyate, Limitation, 243; Preston and Newsom, 263; Hals. Laws, (3rd) 963, 975; Lewin on Trusts, 16th Ed., 704, 5".

With respect, it seems to the present writer that the textbooks referred to do not, on examination, support the proposition for which they are cited in either Halsbury or in **Tito v. Waddell.** The last three sources cited by Megarry V-C. do not deal expressly with the question of the applicability of the Statute; they merely note that the equitable doctrines of

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1. **Mitchinson v. Spenser** (1902) 86 L.T. 618; **Re Clark** (1920) 150 L.T.Jo.94.
2. 4th ed., Time Limits, para. 836, n.3.
3. (No. 2) (1977) 3 All E.R. 129, 248.

limitation are relevant. This view does not necessarily demonstrate that the Statute is inapplicable.[4]

Lightwood, as usual, is by far the most direct and helpful of the text-books. Now it is true that in the passage cited by Megarry V-C., Lightwood does clearly indicate that equitable doctrines may be applied to a claim to set aside a purchase by a fiduciary. However, in an earlier passage in the same work he also considered whether the Statute (the R.P.L.A. 1833) ss. 24, 25, now repealed and replaced by L.A. 1980, s. 21) could apply and, citing **Petre v. Petre**[5] and **Smith v. Smith,**[6] concluded that it could, although he noted that the point was not finally settled.

The last writer cited, Brunyate, was only slightly less positive. He noted[7] that a trustee who has purchased trust property may probably plead the Statute.

The textbooks cited, therefore, far from justifying the conclusion that the Statute is wholly irrelevant, in fact support the view that both the Statute and equitable doctrines of limitation may be applicable. It seems to the writer that the decided cases also support this conclusion.

There are, clearly, a significant number of decisions in which equitable doctrines of limitation have been applied to the purchase by fiduciary of trust property. But the writer has not been able to discover any case in which either:

(i) it is stated in terms that the Statute is irrelevant; or

(ii) the Statute ought clearly to have been applied and yet was not.

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4. This point is discussed further at the end of the current section.
5. (1852) 1 Drew. 387.
6. (1876) Ir. R.10 Eq. 281 and 1 L.R. Ir. 206, C.A.
7. Limitations, p. 102.

In almost all the decisions in which the equitable doctrine is raised, the statutory period had not expired.[8]

It might be thought that the mere fact that laches is relevant must imply that the Statute is irrelevant. For it is commonly said that in cases to which a statutory period applies, laches for less than that period is no bar. However, "laches" can be used in more than one sense. It can mean simply "lapse of time".[9] Or it can be used in a wider sense to mean lapse of time coupled with acquiesence. It seems correct to say that where the right of action is subject to a statutory period, laches in the former sense, i.e. mere delay, short of the statutory period is no defence.[10] Where, however, the plaintiff has done more than merely stand by and has acquiesed, i.e. if his conduct gives rise to an estoppel or amounts to a waiver - then the defendant may rely on that conduct as a defence, although the statutory period has not expired. The doctrine of acquiesence can therefore be said to operate quite independently of the Statute.[11]

Accordingly, the existence of decisions in which laches in its wider sense has been held to be a defence to a claim to set aside a purchase of trust property by a fiduciary, would not necessarily be inconsistent with the existence of a statutory bar. In fact most of the cases in which

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8. **Baker v. Read** (1845) 18 Beav. 398 (17 years);
Clegg v. Edmondson (1857) 8 DeG.M. + G. 787; (9 years);
Gresley v. Mousley (1858) 1 Giff. 450 (18 years);
Browne v. McClintock (1873) L.R. 6 H.L. 456 (19 years);
cf. **Roberts v. Turnstall** (1844) 4 Hare 257,
Barwell v. Barwell (1865) 34 Beav. 371, where the period was 22 years. But it is not clear that the Statute (R.P.L.A. 1833) ought to have been applied in this case. The property appears to have been personalty situated abroad.
9. Lightwood, Time Limits, 254;
Brunyate, Limitation, 189.
10. **Archbold v. Scully** (1861) 9 H.L.C. 360, 383.
11. **Thomson v. Eastwood** (1877) 2 App. Cas. 215, 236.

laches short of the statutory period has been held to be a defence to a claim based on a purchase by a fiduciary, the plaintiff's conduct went well beyond mere inaction and amounted to laches in the wider sense of "acquiesence by positive conduct". However, not all the cases can be so easily explained. In two cases, **Roberts v. Tunstall** (1844)[12] and **Clegg v. Edmondson**[13] mere delay may possibly have been held to be a defence. Thus there is some authority for laches in the narrower sense of "mere delay" being a defence to a claim to set aside a purchase of trust property by a fiduciary and, consequently, it could be argued that the statute cannot be applicable. But the basis on which these cases were decided is not at all clear. Nowhere is it explained why the Statute does not apply to this type of action and there is no case which decides that this is in fact the position. The authorities, it must be frankly admitted, are ambiguous and to some extent inconsistent. In those circumstances, the writer offers the following summary.

Summary: limitation rules applicable to an application to set aside a purchase of trust property by a fiduciary:

(a) A claim to set aside a purchase by a fiduciary in possession is probably not liable to be barred in 12 years under the statute. Such actions are probably caught by L.A. 1980 s.21 (1).

(b) Whether or not purchases by fiducaries are caught by s.21, an application to set aside may certainly be barred in a shorter period by application of the doctrine of acquiesence. But probably mere delay short of the statutory period is not enough - some positive conduct showing acquiesence in probably required, unless, perhaps, the defendant has suffered actual hardship, e.g. by loss or destruction of evidence occasioned by the

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12. Cited above.
13. Cited above; see also **Re Jarvis**, cited above.

plaintiff's delay, (**Roberts v. Tunstall**)[14] or the nature of the property is particularly speculative (**Clegg v. Edmondson**).

The Merits

The probable absence of a fixed statutory period of limitation applicable to this type of claim seems to make little difference since the doctrine of laches is, in general, able to fulfil almost all of the objectives of the law of limitations discussed in this thesis.

Staleness will not always affect a claim to set aside a purchase of trust property by an express trustee. The prohibition on purchase in this case is absolute.[15] In this case, since it is quite irrelevant that the trustee was honest, the sale open and the purchase fair,[16] staleness can do little harm. However, staleness could certainly affect purchases of property by other types of fiduciary. If a fiduciary can show that he took no advantage, made full disclosure and paid a fair price, the sale can be upheld. Staleness might prejudicially affect a defendant faced with the burden of proof on these issues. Similar problems might exist where an express trustee has treated, not with himself, but with the beneficiaries. Such cases are treated in the same way as purchases by fiduciaries, so staleness again may be a problem. Since the right to set aside is normally also conditional on reimbursement of the value of any improvements made by the fiduciary, staleness may also be important if it affects the taking of accounts. As Lord Kenyon M.R. remarked in **Bonney v. Ridgard:**[17]

> "this very case shews the good policy of the (limitation) rule. Here the many persons, through whose hands this property has passed, have relied upon the indisturbed possession and have laid out considerable sums of money in the improvement of it upon that idea. It would be too much at this length of time to give the plaintiffs the relief they require when the accounts cannot be taken".

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14. see Brunyate, 243.
15. **Exp. Lacey** (1802) 6 Ves. 625.
16. **Wright v. Morgan** (1926) A.C. 788.
17. (1784) 1 Cox. Eq. Cas. 145, 149.

The doctrine of laches, however, is well able to take account of the danger of staleness.

Fairness. It is of course possible that an order to set aside may operate unfairly on a defendant in a particular case, as indeed might a refusal to make such an order in favour of an innocent plaintiff. However, the doctrine of laches provides a flexible rule which permits a court, in any particular case, to take the course involving on balance the least hardship to the parties before it.

Conveyancing Implications; the limitation rules discussed above do not seem to have any direct effect on conveyancing practice. A bona fide purchaser without notice will take free from the right of any beneficiary to upset a sale to fiduciary. A purchaser might of course acquire notice in the process of investigating title. He may well then be faced with a difficult decision; either to attempt to discover and then to rely on facts which would support the transaction;[18] or to reject the bargain if his contract permits him to do so. In such a case, if the Statute applied, there would be some conveyancing advantage, with corresponding disadvantage to beneficiaries. The position is not distinguishable from that discussed in the previous section dealing with **Keech v. Sandford** and the probable solution is the same

d. "Knowing Receipt" by a stranger of trust property

A constructive trust may be imposed if a stranger to a trust:

> " receives trust property with notice (including constructive notice) that it is trust property transferred in breach of trust or when (not being a bona fide purchaser of a legal estate for value without notice) the stranger acquires notice subsequent to such receipt and he deals with the property in a manner inconsistent with the trust".[19]

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18. see e.g. **Re Postlethwaite** (1888) 60 L.T. 514.
19. **Karak Rubber Co. Ltd. v. Burden** [1972] 1 All E.R. 1210, 1234.

Again, it is not clear whether L.A. 1980 s.21 applies to claims to recover trust property from this type of constructive trustee. It is often assumed that it does.[20] The judgment in **Taylor v. Davies** suggests that it does not.[21]

This issue, which turns on the effect of **Taylor v. Davies,** has been rehearsed at length in the preceeding sections of this chapter and does not require further repetition. It is appropriate, however, to deal with one further problem at this point.

The words quoted above clearly show that a constuctive trust may be imposed on an innocent recipient of trust property (other than a bona fide purchaser) from the moment notice of the trust is given. The problem is, does such a case fall within L.A. 1980 s.21 ?

It is arguable that section 21 will not stop the running of time against someone who was not a trustee at the moment he went into possession of the property. If the person entering was not a trustee, but a stranger, then a cause of action will accrue against him and time will start to run. Section 21 might not stop time running once the possessor has become a trustee because it only operates by providing that no limitation period shall apply in prescribed circumstances. But if time is already running, **ex hypothesi,** a period of limitation does already apply to the cause of action. It is not at all clear that section 21 is wide enough to suspend an existing period of limitation, as distinct from preventing the application **ab initio** of a period of limitation,[22] since it is a fundamental principle

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20. e.g. Hals, Laws, 4th ed., Vol. 28, para. 853.
21. But cf. **Wassell v. Legatt** [1896] 1 Ch. 554; **Re Dixon** [1900] 2 Ch. 561, C.A.; **Re Eyre-Williams** [1923] 2 Ch. 533; **Re Blake** [1932] 1 Ch. 54, 62.
22. See Goodman (1968) 29 Conv. (N.S.) 356;
cf. Battersby (1971) 35 Conv. (N.S.) 6.
Re Landi [1939] Ch. 828.

of limitation that once time runs, it runs continuously[23] unless the Statute provides a positive exception. The section here in question does not itself seem to the present writer to be in a form appropriate for it to be regarded as such an exception.

There is however, one good argument for the view that section 21 can have a "suspending" effect in the case of actions to recover land. The L.A. 1980, schedule 1, paragraph 8 requires a condition for the running of time, that someone in whose favour the period of limitation can run, must have been in possession throughout the statutory period. It is therefore arguable that, on being constituted a trustee, a possessor ceases to be "a person in whose favour the period of limitation can run", so that the land is no longer in adverse possession and time is suspended.

It should be made clear in concluding discussion of this point that the problem will only arise in cases where the fact that the possessor has become a trustee does not remove the existence of a cause of action. If, as will normally be the case if the possessor is constituted an express trustee, a cause of action to recover the property from him ceases to exist, then time will no longer run for that reason.

Staleness. If L.A. 1980 s.21 does apply, then the legislation makes it possible for disputes to turn on the question of whether or not a recipient of trust property, at a remote date, took with or without notice. Thus claims based on stale evidence might conceivably be litigated. However, the doctrine of laches will usually be adequate to guard against this danger.

Fairness. It might, perhaps, be thought that the effect of L.A. 1980 s.21 (if applicable) would not be unfair, since it depends on the stranger having notice of the trust. In many cases, this may be correct. However, since constructive notice will suffice, it does seem a little inequitable that the penalty for e.g. negligent investigation of title should be perpetual liability. Again, laches will generally protect against this danger.

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23. **Prideaux v. Webber** (1661) 1 Lev. 31.

Conveyancing Practice. Whatever the rule may be, it has little or no direct effect on conveyancing practice. A purchaser investigating title in this, as in other cases previously considered relies on the competence of his own investigations and consequently, on his own lack of notice; he does not directly rely on the Statute.

II In favour of a beneficiary

A. Against a trustee

Accrual of cause of action.

Under an express trust, with a legal estate vested in the trustee, a beneficiary entitled in equity to possession is also regarded at law as being a lawful possessor. Traditionally, in the absence of agreement to the contrary, the beneficiary's possession was accounted for at law by regarding him as tenant at will to the trustee.[24] In such a case, where a beneficiary is holding under a trustee, a cause of action to recover land will only accrue (and so time can only run, at the **earliest)** from the date of actual determination of the tenancy.[25]

However, in some circumstances, no tenancy at will is regarded as arising at law. This might be the case where, e.g. the parties expressly negative a tenancy at will and create some other arrangement.[26]

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24. **Freeman v. Barnes** (1671) 1 Vent. 80;
Pomfret v. Windsor (1752) 2 Ves. Sen. 472;
Doe d. Stanway v. Rock (1842) Car. & M. 549;
Garrard v. Tuck (1849) 8 C.B. 231;
Melling v. Leak (1855) 16 C.B. 652;
Sweet (1914) 30 L.Q.R. 158.
25. **Doe v. Phillips** (1847) 10 Q.B. 130;
Garrard v. Tuck (1849) 8 C.B. 231;
Melling v. Leak, cited above;
Drummond v. Sant (1871) L.R. 6 Q.B. 763.
Between 1833 and 1980 successive statutes provided that tenancies at will were deemed to determine at the end of the first year; but by a proviso in force 1833-1940, "automatic determination" did not apply in favour of any cestui que trust.
26. See e.g. **Hyde v. Pearce** [1982] 1 All E.R. 1029 - where a purchaser under a contract for sale of land was let into possession prior to completion on a determinable licence.

It also seems that no tenancy at will can be found at law where the legal estate is outstanding in a bare trustee and the beneficiary is solely and absolutely entitled.[27] Similarly, if a beneficiary enters without recognizing the title of the trustee, no tenancy at will is created and time runs immediately.[28]

These rules probably extend beyond express trusts so that the position is the same in the case of a beneficiary entitled in equity under a constuctive trust, at least where the beneficiary is solely and absolutely entitled.[29]

The foregoing rules as to accrual of cause of action were however, substantially modified by the 1939 Act. The current provision (1980 Act, sched. 1, para. 9) states that:

> "Where any settled land or land held on trust for sale is in the possession of a person entitled to a beneficial interest in the land or in the proceeds of sale (not being a person solely or absolutely entitled to the land or the proceeds), no right of action to recover the land shall be treated for the purposes of the Act as accruing during that possession to any person in whom the land is vested as tenant for life, statutory owner or trustee, or to any other person entitled to a beneficial interest in the land or the proceeds of sale".

In the case of settled land or land held on trust for sale, therefore, time can never run in favour of a beneficiary unless or until the beneficiary is solely or absolutely entitled.

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27. **Re Cussons Ltd.** (1904) 73 L.J. Ch. 296; **Sands to Thompson** (1883) 22 Ch.D. 614; cf. **Hyde v. Pearce**, cited above.
28. **Fausset v. Carpenter** (1831) 2 Dow. & C. 232, 243;
Portsmouth v. Effingham (1750) 1 Ves. Sen. 430;
Burroughs v. McCreight (1844) 1 Jo. & Lat. 290;
Bolling v. Hobday (1882) 31 W.R. 9.
29. **Beckford v. Wade** (1805) 17 Ves. 87;
Sands to Thompson, cited above;
Bridges v. Mees [1957] Ch. 475;

The merits of the rules.

(i) Express trusts.

a. Staleness. Where the person in possession is alleged to have been there for many years only by virtue of his position as beneficiary under an express trust, the loss of destruction of evidence will only occasionally be a problem for the defendant. Normally, of course, it is for the plaintiff first to prove the trust. It is, however, quite conceivable that time might result in the loss of destruction of evidence with which a defendant might otherwise have demonstrated, e.g. that there was no express trust of the particular property in question or other facts which would have avoided the statutory rules, e.g. facts showing that the beneficiary had at some earlier stage ceased to be in occupation as a beneficiary, as on an informal termination of the trust, or on an informal release, assignment or partition of the trust property.

Nevertheless, the bare possibility of evidence being lost in some cases does not seem to the writer to be sufficient justification for a change to a limitation rule which would permit all beneficiaries in all cases to rely on the statute after 12 years occupation.

b. Fairness. The present rules seem, in general, to produce a fair result in most circumstances as between the actual parties to a dispute. In effect, no cause of action can accrue and so time cannot run unless the beneficiary in possession is solely or absolutely entitled. The Statute will not usually operate unfairly where the beneficiary in possession is solely entitled and a cause of action has accrued.[30] Any other beneficiary in possession will probably have got there only by reason of his status as a beneficiary; he cannot really therefore complain if he is treated as a beneficiary and if the Statute does not operate in his favour. In many

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30. Lightwood, Time Limits, 77.

it would be grossly unfair if one beneficiary could bar the rest merely by long enjoyment.[31] It is true that after many years undisturbed possession, a beneficiary may come to think of himself as being sole owner and he may, consequently, act as such, e.g. by improving or developing the property. Cases of this kind in which old claims might appear to be unfair to the possessor can be imagined. But in many such cases, the person in possession will be entitled to rely on some defence other than the Statute, e.g. estoppel or acquiesence, or on a presumption, e.g. of a release or a conveyance.

c. Conveyancing Implications. The present limitation rules do have implications for anyone investigating title; but in a rather special way. In this instance, the rules do not have a beneficial effect because they guarantee that the person in possession must have a good title; no such guarantee is needed. Either the contents of or the absence of a paper title will normally prevent anyone investigating title being misled into dealing with a beneficiary in possession as though he were an absolute owner. On the contrary, the Statute is significant in this instance because it normally guarantees that the person in possession cannot have acquired a title.

If a beneficiary under a strict settlement or trust for sale could, by long possession, bar his trustees, any purchaser dealing with the trustees and investigating title to property which had been held on trust for more than 12 years, would need to investigate not only the paper title but would also need to consider the possibility that any beneficiary in possession could have acquired separate rights. If the rules were otherwise than as they are, there would be a (small) defect in the statutory overreaching machinery.

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31. Consider the facts of **Higgs v. Nassauvian** [1975] 2 W.L.R. 214.

(ii) Constructive Trusts.

The only situation requiring discussion is that of the beneficiary under a contract to purchase land; this is the only case in which a beneficiary under a constructive trust is likely to be found in possession. Although the point is not free from doubt - see Chapter 8 (leases) and Chapter 5 (adverse possession) it seems to the writer that time can run in favour of a purchaser who goes into possession under a contract for the purchase and sale of land.[32] It seems possible for this to occur even though the purchaser has not paid the full price.[33] The possibility exists because L.A. 1980, schedule 1, paragraph 9 is confined to settled land and land held on trust for sale. The constructive trust under discussion here gives rise to neither. Accordingly, para. 9 does not apply to modify the general rules of accrual. It seems, therefore, that a cause of action might accrue to a vendor and time might run against him, notwithstanding that the purchaser was not solely or absolutely entitled.[34]

a. Staleness might in several ways prejudicially affect the quality of evidence available to a defendant alleged to be in possession as a purchaser under a contract to purchase land. For example, a dispute might turn on whether or not the price was paid or whether or not a conveyance (now lost) was executed.

b. Fairness. If the purchaser in possession had paid the purchase price then, as between vendor and purchaser, there seems to be little reason why time should not be allowed to run in the beneficiary's favour. Moreover, getting in the legal estate will have important effects on the purchaser's position as against 3rd parties; (see below - "conveyancing implications").

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32. **Bridges v. Mees** [1957] Ch. 475; cf. **Hyde v. Pearce** [1982] 1 All E.R. 1029, C.A. The same may not be true in the case of an equitable lessee in possession, **Warren v. Murray** [1894] 2 Q.B. 648; **Drummond v. Sant**, cited above.
33. cf. **Hyde v. Pearce**, cited above.
34. See Preston & Newsom, 3rd ed., 148; cf. **Hyde v. Pearce**, above.

If, however, the beneficiary has not paid the full price, the position is a little different. Clearly, it is not fair that he should get something for nothing; yet the vendor has ample time. If he chooses to allow a purchaser into possession, permits or causes the resulting tenancy at will or licence to be determined and still neglects to enforce his rights for 12 years, he can scarcely complain. The staleness of such a claim is sufficient reason to bar it. Such demands are, in reality, unlikely to occur frequently.[35]

c. Conveyancing Implications.

(i) Sale by purchaser. The lack of a conveyance and probably also of the title deeds is likely to prove a considerable impediment to any purchaser attempting to deal with property. If the original vendor is traceable, it may be possible to rectify the position quite simply by obtaining a conveyance or confirmatory transfer. If the vendor is not traceable, the Statute has a role to play. It would be extremely undesirable if the land were to be rendered almost permanently inalienable in the hands of the purchaser. The Statute can supply the lack of conveyance and remedy the defect.

(ii) Sale by vendor. If the vendor has, as is likely, retained the title deeds, it is quite possible that he might attempt, innocently or not, to deal with the property again. If, for example, the vendor conveys his legal estate to a third party **before** the limitation period has run in favour of the original purchaser, then of course the third party's rights will prevail over those of the original purchaser, unless the original contract was registered under the L.C.A. 1972. If it was registered, no problems are likely to arise in practice. If it was not registered, a purchaser of the vendor's legal estate for money or money's worth will take free from the purchaser's equitable rights.

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35. But cf. **Hyde v. Pearce**, cited above.

On the other hand, once time has run and the vendor's legal estate has been extinguished, it will not be possible for any third party to plead non-registration under the L.C.A. 1972; if the vendor's estate has been extinguished, no third party can have purchased it. This result does not seem unfair. Time can only run if the purchaser is in possession. If he is in possession, his rights are (in most cases) discoverable by anyone interested in acquiring the land.

B. Against a beneficiary

Before 1940, where a beneficiary was in possession of more than his share of the trust estate, time could run against the other beneficiaries as well as against the trustee.[36] It seems that time could run against the beneficiaries out of possession even if it was not also running against the trustee,[37] provided the beneficiary/claimant was actually in possession and not merely in receipt of rent.[38]

The position is now governed by L.A. 1980, sched. 1, para. 9, consolidating L.A. 1939, s.7(5) (set out above). Time can now never run during the possession of a beneficiary under a trust for sale or settlement, except one who is solely or absolutely entitled.

Although no explanation was offered of the reasons for the change effected by the 1939 Act, the present rules seem unexceptional. The merits of the rule on the points of stale evidence and fairness can be assessed in the same way as in the previous section dealing with express trusts.

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36. **Harmond v. Oglander** (1803) 8 Ves. 131; **Burroughs v. McCreight** (1844) 1 Jo. & Lat. 290; **Bolling v. Hobday** (1882) 31 W.R. 9; cf. **Re Milking Pail Farm Trusts** [1940] Ch. 996; critized (1941) 57 L.Q.R. 26 (R.E.M.).
37. **Cholmondeley v. Clinton** (1821) 4 Bli.1; R.P.L.A. 1833, s.24. Lightwood, Time Limits, 83; Brunyate, Limitation, 137 138.
38. Lightwood, Time Limits, 83; Brunyate, Limitation, 137, 138; cf. **Knight v. Bowyer** (1858) 2 De G. & J. 441; **East Stonehouse U.D.C. v. Willoughby** [1902] 2 K.B. 318. See also **Garrard v. Tuck** (1849) 8 C.B. 231; **Doe d. Jacobs v. Phillips** (1847) 10 Q.B. 130.

III In favour of a stranger[39]

It has been settled since before 1833 that the Statute can run in favour of a stranger claiming adversely to trustees. The reason was said to be that the rule that the Statute does not bar a trust estate, holds only as between cestui que trust and trustee, not between cestui que trust and trustee on the one side and strangers on the other:

> "for that would be to make the Statute of no force at all; because there is hardly any estate of consequence without such trust, and so the Act would never take place".[40]

Under the modern law, time may run against trustees in favour of a stranger, just as it does against an absolute owner. However, two special problems require attention in this section.

(i) Strangers as constructive trustees.

It was pointed out in Section I of this Chapter that strangers may in some circumstances be regarded as holding as constructive trustees. It is quite clear, however, that this does not happen whenever a stranger goes into possession of trust property.[41] Leaving aside questions of fraud (see Chapter 11, below) and voluntary assumption of trusteeship (the so-called "trustee de son tort") a stranger receiving property which is subject to a trust will hold it as constructive trustee only if:

a. he receives the property with actual or constructive notice that it is trust property and that the transfer to him was a breach of trust; or

b. although he receives it without notice, he is not a bona fide purchaser for value without notice, and he subsequently is given notice of the trust.[42]

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39. See generally, Lightwood, Time Limits, 79.
40. **Lewellin v. Mackworth** (1740) 2 Eq. Ca. Abr. 574.
41. **Ex parte Hassell** (1839) 3 Y.& C. Ex. 617.
42. **Re Diplock** [1948] Ch. 465, 478, 524, 539; **Nelson v. Larholt** [1948] 1 K.B. 329; **Karak v. Burden**, cited above.

Attention has been previously drawn in this Chapter to two points on which the law of limitation applicable to constructive trustees is not fully clear. First, it is not clear whether constructive trustees constituted in equity in cases of "knowing receipt or dealing" are caught by L.A. 1980, s.21. On the authority of **Taylor v. Davies** (discussed above) it is arguable that the section does not apply to this type of constructive trust.

Second, even if constructive trusts arising when the stranger has notice of the trust **ab initio** are caught by L.A. 1980 s.21, it is not clear that a trust arising only when a possessor subsequently receives notice will also be caught. The question whether section 21 can stop an existing period of limitation from expiring was also discussed in section 1 of this Chapter.

It must in any event be pointed out that the foregoing general statement about the origins of constructive trusts in cases of "knowing receipt" must be modified, in relation to unregistered land, by adding that if the equitable interest in question is registrable under the Land Charges Act, then all strangers will take with notice and as constructive trustees if the interest is in fact registered. Strangers who are "purchasers" (as defined in the Act) will take free from the equitable interest if it is not registered, whether or not they have actual notice.[43]

Of course, the overreaching provisions contained in the 1925 legislation may also free a purchaser from all liability for a prior equitable interest of which he has notice.

(ii) Are all beneficiaries barred when the trustee is barred ?

The second general problem which requires attention in dealing with claims against the whole trust, is the question of the effect that lapse of time against the trustee has on the rights of the beneficiaries.

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43. L.P.A. 1925, s.199; **Midland Bank v. Green** [1981] 1 All E.R. 153.

Before 1833, it seems to have been thought that once the estate of the trustee was barred and extinguished, the interests of all beneficiaries fell with it, since they were then regarded as being dependant on on it.[44] After the enactment of the R.P.L.A. 1833, although there was no clear authority on the point, it was often assumed that nothing had affected the old principle.[45]

This was clearly disadvantageous for beneficiaries under a disability or entitled only to future interests, because it meant **prima facie**, that they might be barred without having had any opportunity to assert their rights. There was, therefore, after 1833, some attempt to ameliorate the position of such beneficiaries. One form taken by these early attempts was the argument that beneficiaries were entitled to rely on the special extensions allowed by the R.P.L.A. 1833 in case of disability, and that future beneficiaries fell within only the 'future interest' provisions of the Act.[46]

It is commonplace today to regard this problem as having been comprehensively solved by the decision of the Court of Appeal in **Re Nisbet and Pott's Contract.**[47] The question in that case, which arose on a vendor and purchaser summons, was whether a restrictive covenant, of which a purchaser had notice, was binding on the vendor. The facts were that

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44. **Hovenden v. Annesley** (1806) 2 Sch. & Lef. 607, 629; **Pentland v. Stokes** (1812) 2 B.& B. 68; **Widdowson v. Harrington** (1820) 1 Jac. & W. 566; cf. **Lewellin v. Mackworth**, cited above; see also **Burroughs v. McCreight**, cited above; Sug. Gilb. Uses, 429. n, 61.
45. But see - **Stewart v. Conyngham** (1849) 1 Ir.Ch.R. 534; **Scott v. Scott** (1854) 4 H.L.C. 1065; **Quinton v. Frith** (1868) I.R. 2 Eq. 416; **Bolling v. Hobday** (1882) 31 W.R. 9; Lightwood, Time Limits, 79; Brunyate, Limitation, 143.
46. See Lewin (11th ed.) 13, 270, 274; Darby & Bosanquet, Limitation, 2nd ed., 418-425.
47. [1906] 1 Ch. 386.

an owner had covenanted not to build on the land, and the covenant was such that it would bind in equity purchasers from the owner who had notice of it. A squatter entered and gained a title to the land which was good as against the owner. The squatter then sold to a person who himself sold to the vendor (Nisbet) in the case.

One of the points argued in the case was that when the original owner's title had been extinguished, all covenants and obligations entered into by the original owner must have been extinguished with it. It was held that this had not happened; the burden of the covenant was held to affect the land itself;[48] it passed with the land and bound all except a purchaser for value without notice. The extinguishment of one title to the land did not therefore bar everything created during the subsistence of that title.

There is little doubt today that the principle of the decision in **Re Nisbet and Pott's Contract** applies to all types of equitable interest. It is not confined to restrictive covenants but applies as much to express as to constructive trusts,[49] and also, at least so far as the Statute is concerned, to interests in the proceeds of sale of land held on trust for sale.[50] The principle is nowadays in fact fully integrated into the L.A. 1980. For example, one of the contemporary criticisms of the original decision was that it undermined conveyancing practice by contemplating that an equitable interest could exist without benefit of a corresponding legal estate.[51] This objection was removed when the legislation was consolidated in 1939. The legislation now provides[52] in effect, that where time has run against a tenant for life, statutory owner or trustee the (legal)

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48. [1906] 1 Ch. 386, 404-406.
49. cf. Brunyate, Limitations.
50. See L.A. 1980, s.18 (1), s.38 and sched. 1 (and cp. **William's & Glyns Bank v. Boland** [1980] 2 All E.R. 408); cf. **Bolling v. Hobday**, cited above. Lightwood, Time Limits, 81.
51. E.g. Williams, 51 S.J. 141, 155; Holds, H.E.L., Vol. 7, p.147.
52. L.A. 1980, s.18 (2) (3) (4).

estate of the tenant for life etc., shall not be extinguished if and so long as the rights of any beneficiary remain unbarred. The object of these provisions is to remove the old conveyancing objection. [53]

Running of time in favour of a stranger : assessment of the rule

In claims between trustees on the one hand, and a stranger to the trust on the other, the Statute may operate. This is clearly desirable; if the position were otherwise time could scarcely ever run since so much land in England and Wales is affected by trusts of one sort or another.

In this instance, it seems possible for the Statute to fulfil each of the traditional objectives of the law of limitations.

Staleness. The Statute may prevent stale claims being litigated by trustees. Old claims by trustees to recover property do not seem to give rise to any special problem involving staleness; the position is directly comparable to a stale claim by an absolute owner; no special issues arise and no further discussion is therefore required in this Chapter.

Fairness. The Statute may in some cases prevent hardship to defendants who have enjoyed long possession. Once again, the issues involved here are indistinguishable from those arising in connection with an old claim by an absolute owner. However, there is one important difference which it is appropriate to discuss at this point. Future interests in land can now take effect only in equity. It is therefore appropriate to discuss at this point the merits of the rule which prevents time running against a person entitled only to a future interest until that interest falls into

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53. Franks, Limitation, 185; Megarry and Wade, 4th ed., 115, 1028. Cf. Preston & Newsom, 3rd, preface and p.144 and Lewin on Trusts, 16th ed., 708, who take the untenable view that s.18 (2), (3) are somehow intended to be for the benefit of a squatter. This view seems to be based on two fallacies. First, it assumes that all squatters are necessarily constructive trustees. Second, that the Statute still operates as a "Parliamentary Conveyance" which transfers the legal estate from a time-barred owner to the successful squatter.

possession.[54] The merits of the 'future interest' rule were fully examined by the Law Reform Committee whose 21st Report[55] preceded the consolidation of the legislation in 1980. The Committee's consultative document attracted an impressive response on this issue, but with a notable conflict of opinion. To summarize the merits, against the present rule it might be said that:

(1) The law leads to undesirably long limitation periods and to the possibility that long established possession might be upset by the falling in, after many years, of a future interest.[56] A property might have been dealt with for many years as though it were a fee simple absolute; an apparently unassailable paper title might exist, and yet, on a future interest falling into possession, trustees might bring an action and recover possession.

Certainty of title to land, it might be said, demands that no such possibility should exist.

(2) Adult trustees will be available to protect the interests of remaindermen.[57]

(3) Adult remaindermen ought in any event to protect themselves.[58]

(4) If a beneficiary were to be barred before his interest fell into possession, he may nevertheless be able to proceed against his trustees for e.g. breach of trust. This ought to be regarded as his principal remedy. In those cases where the beneficiary cannot recover against his trustees then the hardship must be accepted as the price of certainty of title.

As Cyprian Williams put it:[59]

> "it is quite consonant with the spirit of English law that a cestue que trust should occasionally suffer for the trustee's fault".

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54. L.A. 1980, schedule 1, para. 4.
55. 1977, Cmnd. 6923. See also, Law Commission, Title to Land, 1966.
56. See Brunyate, Limitations, 149; Evidence of Public Trustee to Law Reform Committee, p.4.
57. Brunyate, Limitations, 148/9. Evidence of Land Registrar, p.14.
58. Evidence of the General Council of the Bar to the Law Reform Committee.
59. 51 Sol. Jo. 141, 156.

On the other hand a case can be made in favour of the present rule. **(1)** First, it seems in principle unjust that anyone should be barred before he has had a chance to assert his rights.[60]

(2) Second, trustees do not in practice always exercise effective supervision over trust property, and so may remain unaware of encroachments.[61] This has been said to be particularly dangerous where the beneficiaries in question are infants or unborn or where an adult beneficiary is in occupation.

(3) The remedy against the trustee might be ineffective in practice and the consequent hardship is too great to be reasonable policy.[62]

As the Law Reform Committee noted, the question is a difficult one about which different views might be held. The one comforting factor is that no commentator has regarded the point as giving rise to serious practical problems. On the contrary, distinguished evidence to the Law Reform Committee suggested that the rule rarely if ever causes hardship in practice.[63]

In these circumstances, it is difficult to quarrel with the Committee's view that, in the absence of evidence of hardship (of which the present writer knows of none) it is better to leave the rule as it is.[64]

Conveyancing Implications

In this thesis, the writer has suggested that the Statute of Limitations may indirectly but beneficially affect conveyancing practice. The Statute can, in effect, provide a qualified guarantee to all purchasers that legal

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60. Evidence of Land Registrar to Law Reform Committee.
61. Law Reform Committee, 21st Report, para. 3.62. General Council of the Bar, Evidence. Land Registrar, Evidence.
62. Law Reform Committee, para. 3.62.
63. Evidence of: The Institute of Conveyancers; The Land Registrar; The Law Society.
64. 21st Report, para. 3.64. It should be added that the bona fide purchaser defence will be available in some cases against future equitable interests, at least where the stranger's title is derived originally from the trustees.

estates which might be concealed behind a good root of title at least 15 years old can normally no longer be enforced. The result is that a purchaser need not concern himself about such estates and so can normally rest content with proof of title over only the relatively short statutory period.

Where the equitable rights in question are present rights enjoyed by persons not under a disability then there is no doubt that the Statute may also operate to protect a purchaser. Thus, if A, a purchaser, investigates title from a good root at least 15 years old, it does not matter to him that at the date that instrument was executed, a better legal title was vested in third parties X and Y. The Statute will have barred their legal rights. Nor does it matter to A, if X and Y, held on trust, e.g. for themselves as beneficial joint tenants, provided that no question of disability arises. Time will have run against both legal and equitable rights at the same moment. Here, therefore, as in other cases, the Statute can give purchasers a qualified guarantee of security of title because it will have barred any adverse claim - any right of action to recover the land being purchased - which was current at the moment the document constituting the root of title was executed and which is concealed behind it. It is true, of course, that the Statute does not guarantee that all outstanding equitable rights have been barred. As the Law Commission pointed out in "Transfer of Land - Interim Report on Root of Title to Freehold Land", perusal of title for the statutory minimum period may not reveal that "although trustees may have been dispossessed more than 30 years ago (30 years being then the 'statutory minimum period'), they may be able to bring an action to recover the land when a future interest falls into possession". The trustees may also be able to bring an action outside

the normal limitation period where a beneficiary has been under some disability. However, as pointed out under the heading "Fairness", above in the absence of any evidence of hardship being caused by the present rule, the theoretical possibility than an innocent purchaser might be disturbed when, e.g. a future interest falls into possession, ought not to be regarded as a risk serious enough to justify any alteration in the legislation.

PART IV

CHAPTER 11

EXTENSION AND EXCLUSION OF ORDINARY TIME LIMITS

Introduction

The Limitation Act 1980, like its predecessors, contains provisions which extend or exclude the ordinary time limits provided by the Act in special cases. This chapter deals with those special cases and attempts to measure them against the general policy objectives of the Statute which were outlined in Chapter 1 of this thesis.

The 'special cases' here dealt with fall into three categories: acknowlegements; disability; and fraud concealment and mistake. A separate section of this chapter is devoted to each category.

1. Acknowledgements

This section is divided into two parts. The first outlines the law of acknowledgements as it now stands. The second then considers the aims of the present rules and measures them against the general objectives of the law of limitations.

1. The Law

The Limitation Act 1980, like the 1939 Act, contains general provisions which extend the normal limitation period for an action to recover land where an acknowledgement of title has been made.[1] Section 29 of the Act provides that where a right of action to recover land has accrued, then if the person in possession of the land in question acknowledges the title of the person to whom the right has accrued, that right shall be treated as accruing only on the date of acknowledgement and not before.[2] The result of an acknowledgement of title is therefore to give a new starting point to the Statute, from which time immediately begins to run afresh.[3] A current period of limitation can be repeatedly extended by successive acknowledgements; but to be effective, an acknowledgement must be given whilst time is running. Once a right of action has been barred no later acknowledgement can revive it. [4]

The legislation also contains provisions as to the form which an acknowledgement must take. To be effective for the purposes of section 29, an acknowledgement must be in writing and signed by the person making it. It must be made either by the person in possession or his agent; and it must be made to the person whose title is being acknowledged or his agent. The legislation does not, however, specify the precise form of words to

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1. "Part Payment" which is really a particular form of acknowledgement and has the same effect on certain rights of action, was considered in relation to Mortgages (Chapter 9) and Leases (Chapter 8).
2. L.A. 1980, s.29 (1), (2). A similar rule prevents time running in favour of a mortgagee in possession who acknowledges the mortgagor's title; s.29 (4).
3. **Scott v. Nixon** (1843) 3 Dr. & War. 404.
4. L.A. 1980, s.29 (7); **Sanders v. Sanders** (1881) 19 Ch.D. 383.

be used or state expressly what is meant by "an acknowledgement of title".

This has, however, been held to mean any statement from which an admission of the owner's title can fairly be implied.[5]

Once made, an acknowledgement of title to land binds all other persons in possession during the ensuing limitation period, whether they were parties to it or not and whether or not they claim through the acknowledgor.

The Policy

The aims of the acknowledgement provisions of the Act, so far as concerns claims to recover land, seem originally to have been to allow an owner to safeguard his title and preserve his ownership, without the need either to eject the occupant or to commence proceedings against him.[6] This was no doubt a reasonable policy in 1833 when legislation first expressly noticed acknowledgement as a reason for extending the period of limitation for actions to recover land.[7] At this time, all permissive possessors were regarded as tenants at will. And of course, under the R.P.L.A. 1833, time ran in favour of a tenant at will from the end of the first year, at the latest. The statutory provision for acknowledgements therefore meant that an owner could safely allow a permissive occupant to continue in possession for many years, provided that he regularly remembered to obtain a written and signed acknowledgement. Taking an annual written acknowledgement also meant that a prudent owner could, if he wished, allow a former tenant to continue in possession rent free, without the need to create a new tenancy and without any danger that the Statute would operate as a bar.

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5. See **Edgington v. Clark** [1964] 1 Q.B. 367.
6. Hayes, Conv., 4th, (1840), 268; 2 Sugd. V. & P., 10th ed., 351.
7. The law of acknowledgements of title to land has its origins in the doctrine of acknowledgement of debts which the Courts engrafted onto the Limitation Act 1623 (**Spencer v. Hemmerde** [1922] 2 A.C. 567) and in, in equity before 1833, in suits to redeem mortgages, where acknowledgements by a mortgagee in possession were held to show that the possession was non-adverse. The doctrine was made applicable (in modified form) to a wider variety of claims by the R.P.L.A. 1833; s.14 (recovery of land or interest); s.28 (suits to redeem mortgages); s.40 (money charged on land); s.42 (arrears of interest).

But the case for statutory acknowledgements is much less compelling today. Nowadays, time does not automatically run in favour of all permissive occupants.

On the contrary, time will rarely run in such cases. The special rule applicable to tenancies at will was repealed in 1980. The result is that if a tenancy at will is found to exist, time will not run until the tenancy is proved to have been determined. Nor are all permissive possessors still regarded as tenants at will - possessory licences are now possible. Here again, time will not run unless and until the licence is determined. Now where a tenancy at will or licence has actually been determined, it seems unlikely that many owners will wish to forebear in pressing for possession. It seems to the present writer, therefore, that tenancies at will and licences provide entirely adequate means of safeguarding a title against the Statute whilst permitting rent-free occupation. The statutory provisions for acknowledgements seem unnecessary.

The present statutory provisions are also open to a second criticism. They are scarcely known to the public and little utilized (intentionally) by the profession. In practice, to judge from the reported cases, acknowledgements are more often given inadvertantly than deliberately. The facts of the case of **Dublin Corporation v. Judge**[8] are typical of the operation of acknowledgements in land claims. The occupier in that case made a proposal to take a lease from the person claiming as owner. It was held that in doing so he had inadvertently acknowledged title and time started to run afresh. Franks[9] criticizes this type of acknowledgement:

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8. (1847) 11 Ir. L.R.8. See also **Fursdon v. Clogg** (1842) 10H. & W. 572; **Wright v. Pepin** [1954] 1 W.L.R. 635; **Edgington v. Clark** [1964] 1 Q.B. 367.
9. Limitation, 217.

> "the Statute provides a legal defence for defendants on the ground of public policy, the effect of which is rarely appreciated except by their legal advisers. However, the doctrine of acknowledgement allows defendants to cast away this protection without any knowledge that they are doing so, with the result that this particular public policy is entirely thwarted".

The fact, however, that an acknowledgement of title to land can only be effective whilst the limitation period is on foot - not after it has expired - somewhat reduces the force of Franks charge when applied to this class of case.

A third associated criticism is that the present rules do not operate with the certainty which is desirable in a Statute of Limitations. For example, an acknowledgement must recognise the title of the owner. But no particular form of words is necessary. It is always a question of construction of the words actually used. It is true that signed writing is required, so that disputes about what precisely was said and by whom are excluded. However, parol evidence is not irrelevant. Although the acknowledgement itself must be in writing, parol evidence can be given on vital points such as the date of the acknowledgement[10] and the identity of the person to whom it was made. Further, while a verbal acknowledgement can have no effect as such, it may nevertheless be material in other ways. E.g., it may indicate an intention to create a tenancy or a licence or it may demonstrate the establishment of an agency.[11]

One particular source of dispute (and consequently, of uncertainty) is the possibility of an acknowledgement being made by or to an agent. A number of cases have turned on the questions of whether the existence of an agency had been established, and on the scope of the authority of

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10. **Jayne v. Hughes** (1854) 10 Ex. 430.
11. See Preston and Newsom, 4th, 229.

the agent in question to make an acknowledgement.[12]

However, although the acknowledgement rule is open to to criticism it does not seem to be a significant obstacle to the achievement of the general objectives of the Statute. It is true that the rule is inconsistent with one of the generally stated aims of the law of limitations, viz. that it should enable a person to feel confident, after the lapse of a given period of time, that an incident which might have led to a claim against him is finally closed.[13]

The acknowledgement rule is inconsistent with this aim because of the uncertainty surrounding the operation of the rule. Clearly, however, this is not a major failing. And the rule is not inconsistent at all with the two other principal objectives of the Statute.

To deal with each in turn, first, although the rule can extend the length of the limitation period, it does not inevitably lead to old claims being litigated on stale evidence. The reason is of course that an acknowledgement itself tends to prove the plaintiff's case. Second, the rule does not seem to be detrimental to general conveyancing practice. It does not make unregistered titles less secure.

In this thesis it has been suggested that one important object of the Statute is to simplify, expedite and reduce the cost of investigating unregistered titles by barring stale claims. The rule permitting acknowledgements does not impinge on this objective. It is true that a purchaser who has investigated title from a good root at least 15 years old cannot be absolutely sure that time has run; it is just conceivable that at some time within the last 12 years, the person in possession may have made a written acknowledge-

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12. See e.g. **Wilson v. Walton** B.S. (1903) 19 T.R.L. 408; **In re Coliseum (Barrow) Ltd.** [1930] 2 Ch. 44; **Wright v. Pepin** [1954] 1 W.L.R. 635; **Edginton v. Clark**, cited above.
13. Law Reform Committee, 21st Report, p.3.

ment of title to a 3rd party. But this bare possibility is scarcely worth entertaining. The idea that a dispossessed owner would be content with nothing more than a written acknowledgement from a person in possession under an independent paper title, or that such a possessor would ever provide such an acknowledgement, be allowed to remain in possession and then go on and attempt to deal with the property, is too fanciful to be seriously considered as a threat to the security of titles. Accordingly, it is suggested that the fact that time can be extended by a written acknowledgement has no implications whatsoever for general conveyancing practice.

The position is a little different where a vendor is attempting to sell a title which is known to be merely possessory. In such a case, the possibility that at some stage a written acknowledgement has been made is more realistic. However, no investigation of title can convincingly demonstrate a negative - i.e. that no acknowledgement was ever in fact made. Accordingly, there is little that a purchaser can do in most cases to guard against the possibility. It is however, common practice to require the absence of a written acknowledgement to be asserted in such statutory declarations as the purchaser may take.

In summary, it is suggested that the acknowledgement rule serves little useful purpose. It is no longer needed for the principal purpose for which it was intended, in the case of actions to recover land. It may, however, still be useful in the rare case of prolonged possession by a mortgagee.[14] Its practical importance in the case of other types of actions to recover land seems to be as a trap for the unwary. The rule does not, however seem to obstruct the general objectives of the law of limitations.

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14. And the part-payment provisions applicable to actions to recover land (Chapters 8 & 9 above) remain important.

2. Disability

The 1980 Act, like its predecessors, contains provisions permitting extension of the limitation period for actions to recover land in cases of disability.

Section 28 of the 1980 Act provides that if on the date when a right of action (including a right of action to recover land) accrued, the person to whom it accrued was under disability, the action may be brought at any time within 6 years of the date when he ceased to be under a disability or died, whichever occurs first.

A person under disability is not, therefore, necessarily barred when the primary limitation period has expired against him. He can still bring an action at any time within 6 years of ceasing to be under a disability or his successors can bring an action within 6 years of his death if he dies under disability.

Disability for the purposes of the Statute means infancy or unsoundness of mind. [1]

There is no doubt that the extension of time allowed to persons under disability is intended to avoid hardship to persons whilst they are not able to protect themselves. [2] However, the existence of the extension does represent some threat to the security of titles, for it makes it possible for undiscoverable rights to be enforced against a bona fide purchaser who has conducted a thorough investigation of title. It is therefore appropriate to enquire whether there is today any reason for continuing to allow special privilege for disability. It might be doubted whether there is. The Chief Land Registrar has pointed out that [3]

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1. A person is an infant, for the purposes of causes of action accruing after 1969, until the first moment of his 18th birthday. F.L.R.A. 1969, s.1 (4), s.9, schedule 3, para. 8.
2. Hayes, Conv., 5th (1840) , 239; Law Revision Committee, (1936) Cmnd. 5334, p. 18.
3. Unpublished evidence to Law Reform Committee, p. 14. The Public Trust commented in his unpublished evidence to the same effect.

> "Whenever there is a minority, the relevant statutory provisions ensure that the legal estate is always vested in an adult. This means that there will always be a trustee who should be capable of, and indeed should be responsible for, looking after any real property in his care. Again, when the stage has been reached where the owner of the land is recognised by law as being mentally ill, there will normally be someone responsible (e.g. a receiver) for looking after his affairs."

This question of whether a beneficiary under a disability ought to have special treatment for limitation purposes, or whether he ought to rely only on his trustees for protection, was discussed in Chapter 10. In this Chapter; it is necessary simply to repeat that it is still widely felt that the remedy against the trustee is not always effective in practice[4] and that trustees do not always exercise effective supervision over trust property. [5]

There is, therefore, clearly some case for the special extensions for disability, which the writer would suggest are actually unobjectionable, for two reasons. First, as the rest of this Chapter will illustrate, the extensions are only available in very limited circumstances. Second, and partly in consequence, the risk of insecurity of title to property is minimal.

The extension for disability is very narrowly drawn, being available only if the person in question is under disability at the moment his right of action accrues. Therefore:

(1) Extension is not available if the person in question comes under disability only after his cause of action has accrued. Thus if a man is of sound mind when he is dispossessed but becomes insane on the following day, no period of disability is allowed to him.[6]

This rule, which has existed since before 1833, has generally been supported for two good reasons. First, because notwithstanding its apparent rigor, cases of hardship caused by the rule are difficult to find.[7] Second, because

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4. But where, as is often the case, the Official Solicitor is the receiver, compensation is available from central funds.
5. See e.g. Real Property Commission, 1st Report, p.44.
6. L.A. 1980, s.28 (1); **Owen v. De. Beauvoir** (1847) 16 M & W. 567.
7. Real Property Commission, 1st Report, 45.

any other rule would materially threaten the security of titles[8] and consequently, would affect the cost of proving and investigating title. The Law Reform Committee therefore concluded in 1977 that, on balance, this rule ought to be preserved.

(2) If a cause of action has accrued to a person under a disability (e.g. infancy) who thereafter ceases to be under any disability, no subsequent disability (e.g. subsequent mental disorder) afterwards affects the operation of the Statute. This rule is really a particular example of rule 1 above, that only disability existing at the moment the cause of action accrues is relevant, and can be supported on the same grounds. There is, however, one exception: if an infant is of unsound mind at the moment of his majority, he is allowed a period of 6 years measured from the cesser of that disability.[9]

(3) Only the disability of the person to whom the cause of action **first** accrues is relevant. If, e.g. a cause of action to recover land accrues to an adult of sound mind who dies, leaving an infant entitled to the property, no extention is allowed to the infant.[10]

If, however, in this sample, the adult was himself under disability at his death, the infant can of course take advantage of the extension of 6 years allowed from that death, but no further extension is allowed. This rule has also been supported on the grounds mentioned above. As the Real Property Commissioners put it:

> "it is exceedingly improbable that there should be a succession of persons neglecting or betraying the interests of others confided to them; and the risk of this seems a much less evil than the insecurity of titles which a contrary rule would occasion."[11]

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8. Law Reform Committee, 21st Report, (1977), Cmnd. 6923, 19.
9. L.A. 1980, s.28 (1); **Burrows v. Ellison** (1871) L.R. 6 Ex. 128.
10. L.A. 1980, s.28 (2); **Murray v. Watkins** (1890) 62 L.T. 796; **Garner v. Wingrove** [1905] 2 Ch. 233.
11. First Report, p.45.

(4) Finally, by virtue of a special provision applicable only to actions to recover land or money charged on land, extension for disability is subject to a maximum possible period of 30 years from the date on which the right of action first accrued. In no case can land be recovered by virtue of disability after this period.

This deadline principle was first introduced by the R.P.L.A. 1833. The idea had the general support of those giving evidence to the Commissions and was adopted by the Commission on the grounds that to allow disability to give rise to indefinite extension was unwise.

In the absence of such a deadline, there would be a great danger of stale disputes being litigated after evidence had perished and a similar danger that possession disturbed after a very long period would be likely to cause greater hardship to a defendant than would be caused to the plaintiff by barring his remedy. The Real Property Commissioners thought that claims would in any event be brought within the deadline period except in rare cases.[13] On balance, the advantages of this period would appear to outweigh any hardship caused.[14]

It might, therefore, fairly be concluded that extension of the limitation period for disability is only available in very limited circumstances. But this is not necessarily unfair. It is submitted that the legislation, as the foregoing notes indicates, in fact attempts to draw a careful balance between, on the one hand, the need for fairness to claimants, and, on the other, the need to ensure the security of title to property and to limit the cost and time involved in proving and investigating such titles. This attempt seems to have been reasonably successful. Cases of hardship (in relation to claims to recover land) caused to those under disability by the present rules seem

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12. L.A. 1980, s.28 (4).
13. The Official Solicitor, in evidence to the Law Reform Committee said that the extended period was useful to him as receiver in some cases.
14. See Tyrrell, Evidence to Real Property Commission, p.331.

to be rare. There are probably a number of reasons for this. The long basic limitation period which is available and the fact that trustees or a receiver will usually be available to take action against trespassers, would seem to be important factors in avoiding hardship.[15]

On the other hand, the extension allowed for disability (being tightly circumscribed) does not appear to materially affect the security of title to property. It is of course conceivable that a purchaser might conduct an exemplary investigation of title for at least the statutory minimum period and yet might fail to discover the interest (concealed behind the root of title) of a person under disability, and that interest might be enforced against him by virtue of section 28 of the Limitation Act.

But this seems to be a theoretical rather than a real practical risk. In practice, it is unlikely that trustees or a receiver will have been dispossessed of the land more than 15 years before and yet have taken no steps to recover it.[16] But where this has happened, it is even more unlikely that an apparently satisfactory paper title at least 15 years old will have come into existence during the maximum periods allowed for disability, which are 24 years for infancy[17] or 30 years in case of unsoundness of mind.

It seems, therefore, fair to conclude with the Law Commission[18] and their correspondents[19] that the risks arising (in unregistered conveyancing) from outstanding claims by persons under disability are insignificant.

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15. See e.g. Real Property Commission, First Report, p. 45.
16. Law Commission, Title to Land, p. 12.
17. Age of Majority plus 6 year extension.
18. Title to Land, p. 12.
19. Ibid, p. 16.

3. Fraud, Concealment and Mistake

Section 32 of the Limitation Act 1980 contains provisions which postpone the running of time where either -

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake.

In these cases, time does not run until the plaintiff discovers, or could with reasonable diligence have discovered, the relevant fraud, concealment and mistake.

The section is of rather wider ambit than appears at first sight, because "defendant" bears a widely extended meaning. It includes the defendant's agent and any person through whom the defendant claims and his agent.[1] "Claiming through" also bears an extended meaning.[2] Consequently, the section may be invoked against a defendant who is himself innocent of any fraud or concealment. In theory, therefore, section 32 might postpone the running of time indefinetely, so that an action to recover land might lay dormant (but unbarred) for centuries.

In practice, however, to have this effect, the land will usually have to remain unsold, because the section contains an express saving for innocent purchasers of any property. Section 32, sub-section (3) provides that nothing in the section shall enable any action -

(a) to recover, or to recover the value of, any property; or

(b) to enforce any charge against, or set aside any transaction affecting, any property

to be brought once the property in question has been purchased for value by an innocent third party since the fraud, concealment or mistake took place.

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1. L.A. 1980, s.32 (1).
2. L.A. 1980, s.38 (5).

An innocent third party is defined for this purpose as one who was not a party to the fraud or concealment and did not at the time of his purchase know or have reason to believe that the fraud or concealment had taken place or that the mistake had been made.[3] The result of these provisos is of course, that an unsuspecting purchaser need not worry that there might be, concealed behind the root from which he has investigated title, an adverse claim to the property against which time has not run because the claim is based on fraud or mistake or because relevant facts have been concealed by a predecessor in title. It might therefore be said that, even in cases falling within section 32, the Statute provides a guarantee of security of title to innocent purchasers.

However, the main object of this provision is not to simplify investigation of title. In the nature of things, if the existence of a cause of action to recover land cannot be discovered with reasonable diligence by the person entitled to it, it will not necessarily be discovered by a purchaser investigating the (defective) title to that land. Since there is little that can be done by way of conventional inquiry or investigation which will reveal that the title in question is affected by a "concealed" claim or an adverse claim based on fraud or mistake, there is naturally little scope for section 32 (4) to effect any simplification. [4]

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3. L.A. 1980, s.32 (4).
4. However, in one or two cases a purchaser might conveivably be able to discover the defect. For example, investigation of a title over an extended period might obviously reveal an otherwise concealed break in the chain of title, where that break was the result of fraud, concealment or mistake.

   Again, the "outstanding terms" technique referred to in Chapter 3 (above) could safeguard a purchaser against certain types of fraud or concealment; e.g. that which occurred in **Re McCallum** [1901] 1 Ch. 143 (C.A.) - concealment of a voluntary transfer held to be concealed fraud; cf. **Re Levesley** (1915) 32 T.L.R. 45 - similar facts, no fraud found.

   It might therefore be argued that section 32(4) has some role to play in simplifying investigation of title since it obviates the need for heroic investigation over a prolonged period and the need for special devices such as outstanding terms.

It seems in fact that the philosophy of section 32 is based on two principles. First, that -

> "it is obviously unjust that a defendant should be permitted to rely upon a lapse of time created by his own misconduct".[5]

But second, that in competition between an innocent plaintiff and an equally innocent defendant claiming title by purchase, the latter should be allowed to rely on the Statute and so to prevail against the older claim. The mainspring of section 32 (4) is clearly the desire to achieve, on balance of hardship, the result which is the least unfair to the parties before the court.

Of course, section 32 (4) is confined, in terms, to protecting purchasers. It does not extend e.g. protection to long possession of persons who claim only by succession. An ancient claim might, therefore, conceivably operate to cause extreme hardship to those who have innocently relied only on a long-continued possession. For this reason, in the 19th century, the Courts strictly interpreted R.P.L.A. 1833 s.26, which applied to claims to recover land a rule which was similar (but by no means identical) to the present section 32.[6]

Vice Chancellor Mallins expressed the policy clearly in **Chetham v. Hoare**[7] where a claim which was 149 years old was asserted:

> "I think it of very great importance that this section, which in its widest extent would give the right of recovering the possession of land at any time whatever (in this case it is one century, and upon the arguments I have heard it might just as well have been after 5 centuries), should in the interests of society receive the very strictest interpretation".

To do otherwise, Mallins V.-C. himself suggested in the later case of **Willis v. Howe**,[8] would tend to make all titles unsafe.

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5. Law Reform Committee, 5th Report, (1936), p.29.
6. For example, under R.P.L.A. 1833, s.26 the plaintiff had to be deprived of possession by the fraud. This is no longer the case.
7. (1870) L.R. 9 Eq. 571, 572.
8. (1880) 50 L.J. Ch.4.

It seems likely that a modern court would take a similar attitude and could protect long possession against ancient claims by, for example, following classic authority[9] and insisting that any plaintiff prove strictly that he or his predecessors could not with reasonable diligence have discovered the fraud, concealment or mistake at an earlier date.

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9. **Chetham v. Hoare** (1870) 9 Wq. 571; **Lawrence v. Norreys** (1890) 15 App. Cas. 210; **Willis v. Howe** [1893] 2 Ch. 545.

CHAPTER 12

THE LENGTH OF THE LIMITATION PERIOD

Introduction

This Chapter is divided into two sections. The first deals with the exceptional cases in which a limitation period of more than 12 years is prescribed by the 1980 Act. The second section deals with a quite different topic. It considers and traces the historical relationship between the length of the limitation period and the period for which title must be proved under an open contract for the sale of land.

I The modified limitation periods

This section deals with the special limitation periods (found in schedule 1, part 2 of the 1980 Act) which are available to the Crown and to any spiritual or eleemosynary corporation sole. Each category requires separate attention. After the rules governing each category have been summarized, the effect of the provisions is measured against the principle policy objectives of the law of limitations which have been identified in this thesis.

A. Crown Land - Summary

Land other than foreshore

a.	Vested in Crown throughout	30 years from accrual [1]
b.	Acquired by Crown after accrual	30 years from accrual [1]
c.	Acquired from Crown after accrual	30 years from accrual or 12 years from acquisition, whichever expires first. [2]

Foreshore

a.	Foreshore	60 years from accrual [3]
b.	Former foreshore, where cause of action accrued while land was foreshore and land remains in Crown ownership	60 years from accrual or 30 years from cesser, whichever expires first. [4]
c.	Foreshore acquired from Crown	60 years from accrual or 12 years from acquisition, whichever expires first. [5]

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1. L.A. 1980, Sch. 1, Part II, para. 10.
2. L.A. 1980, Sch. 1, Part II, para. 12.
3. L.A. 1980, Sch. 1, Part II, para. 11(1).
4. L.A. 1980, Sch. 1, Part II, para. 11(2).
5. L.A. 1980, Sch. 1, Part II, para. 12.

"The Crown" for the purposes of these provisions includes her Majesty in right of the Duchy of Lancaster;[6] the provisions are also expressly made to apply to the Duke of Cornwall.[7]

Originally, because of its special constitutional position, no Statute of Limitations bound the Crown.[8]

However, the Statute 21 Jac. 1, c.2 imposed a limitation period of 60 years, but this period was calculated by reference to the period immediately before the commencement of the session of Parliament in which the Act was passed, so that the statute in time lost its effect. Eventually, the Crown Suits Act 1769, introduced a more effective period of limitation calculated backwards from date of commencement of proceedings. The period fixed by the Act of 1769 (as amended by the Crown Suits Act 1861) was 60 years, which was the same as the period for which (in both 1769 and 1861) title had to be proved under an open contract for the sale of land.

The modern scheme of limitation (summarized above), under which the period normally available to the Crown was reduced from 60 to 30 years, was introduced by the Limitation Act 1939. This followed the recommendation of the 1936 Law Revision Committee who suggested that

> "it may cause hardship if claims can be enforced in respect of a cause of action which arose before the commencement of the period during which a purchaser is entitled to investigate title".[9]

Since the period for investigation of title was, at the time, 30 years,[10] the Committee recommended that the limitation period available to the Crown should also be reduced to 30 years. This change was effected by the 1939 Act.

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6. L.A. 1980, s.37(3).
7. L.A. 1980, s.37(4).
8. Lightwood, Time Limits, 140.
9. Report, 1936, Cmd. 5334, p.13.
10. L.P.A. 1925, s.44.

Since 1939, of course, the period for which title must be proved under an open contract for sale of land has been reduced still further by the Law of Property Act 1969. That was done as a result of a report by the Law Commission,[11] which noted in passing that if the period for investigation of title was reduced to 15 years, then

> "there would be a greater risk that ... investigation of title might fail to reveal rights enforceable by the Crown."[12]

The Law Commission thought that this risk was not significant and was acceptable. However, they went on to suggest that at some future stage it would be necessary to consider whether the limitation period available to the Crown ought also to be reduced to 15 years.[13] That opportunity for reconsideration arose when the Law Reform Committee began to review the law of limitation in 1971.

The case for retaining the abnormally long period in favour of the Crown was put to the Law Reform Committee on the basis that the Crown was to be distinguished from ordinary landowners. Where the land in question has been owned by the Crown throughout, the extended period was said to be justified because:

> "Some Government Departments (notably the Ministry of Defence) own considerable tracts of remote and uncultivated land, encroachment on which may well not come to the notice of officials of the Department until many years after it has been started".[14]

The practical result was said to be that the Treasury Solicitor acting on behalf of the department concerned often has to (and is able to) enforce claims against squatters who have been in possession of Crown land for more than 12 years.

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11. Law Commission, 1967, Report No. 9.
12. Report, cited above, p.12.
13. Report, cited above, p.20.
14. Twenty-first Report, 1977, Cmd. 6923, p.42.

This argument in favour of the Crown must be treated with caution.

First, it ought to be pointed out that the exception in the 1980 Act in favour of the Crown is not confined to "remote and uncultivated" tracts. It applies to **all** Crown land. In 1977, land vested in the Crown (the Crown Estates and the estates of the Duchies of Cornwall and Lancaster) together with land vested in central government departments, was thought to extend to 868, 192 ha.[15] But of this total, 26.5% consisted of let farmland. At least another 46% consisted of woodland, most being managed by the Forestry Commission on a commercial basis. The result suggested is that approximately 72% of Crown land cannot be described as "uncultivated".

How extensive is the Crown's holding of "remote and uncultivated" property? The remaining 28% of Crown land which is neither farm nor forest land, cannot be further categorized from published sources. In general, no figures are available which distinguish even between developed and undeveloped land. The sole exception is the case of the Forestry Commission, whose annual report for 1976 revealed that 41,700 ha. of its land in England and Wales fell into a category labelled "unplantable and miscellaneous". It seems likely that a good deal of this land also falls into the "remote and uncultivated" category.

It also seems likely that the Ministry of Defence has significant holdings of this type of land. Although no classification by type of use can be given, in 1972 this Ministry held 162,198 ha. of land in England and Wales which was not farmland.[16] This figure includes the sites of

> "army barracks, military ranges, exercise grounds, RAF airfields and in many cases adjacent villages, as well as naval shore establishments".[17]

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15. "Landownership by public and semi-public institutions in the U.K.", Harrison, Tanter & Gibbs, Centre for Agricultural Strategy, Reading, 1977.
16. Dowrick, (1974) Public Law, 10.
17. Dowrick, cited above.

But even allowing for the large areas of Ministry land which are therefore occupied by buildings or are securely fenced, it seems likely that Defence occupies very large tracts which fall into the "remote and uncultivated" class.

Other Crown land known to fall within at least the "uncultivated" element in the description, includes 30,757 ha. of common land owned by the Crown Estates in Wales and 6,500 ha. of moorland belonging to the Duchy of Lancaster.[18]

On the basis of the foregoing information (limited though it is) it nevertheless seems fair to accept the argument addressed to the Law Reform Committee that some government departments do own considerable tracts of remote and uncultivated land.

However, it might be questionable whether, on the basis of published information, the Crown is thereby distinguished from all other landowners so that the special limitation period is justified.

Despite the size of the Crown's holdings, there are one or two other owners whose estates can be compared with those of the Crown. For example, the National Trust and the Royal Society for Protection of Birds together held, in 1977, a total of 85,523 ha. of freehold or leasehold land in England and Wales which was neither farm nor woodland. No special extention of the limitation period is permitted to either of these bodies. If the comparison is fair, it seems that the Crown enjoys a special privilege, even though it is not a unique case, even in the "remote and uncultivated" category.

Having examined the stated justifications for the Crown's extention, it is now necessary to turn to assess the effects of the rule by examining the extent (if at all) to which it interferes with the general policy objectives of the law of limitations.

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18. Harrison, Tranter & Gibbs, cited above.

a. Staleness. It was suggested in Chapter 2 of this thesis that the law of limitations usefully guards against staleness - that is, against the problems which might otherwise be caused by the perishable nature of deeds and other documents, as well as all forms of testimony. The limited extension of the statutory period allowed to the Crown does not seem in practice to be inconsistent with this objective. In practice, it seems unlikely that a formal Crown grant or lease would frequently be totally lost from sight and mind of all parties within a period as short as 30 years. The danger of adjudicating on stale claims does not therefore seem to be any objection to the current limited privilege given to the Crown.

b. Diligence. The second of the three generally accepted objectives of the Statute is to encourage plaintiffs not to sleep on their rights. A 30 year limitation period certainly seems likely to be less effective in achieving this objective than a 12 year limitation period. Nevertheless, proponents of the present rule can assert with some (albeit not unique) cause, that the nature of Crown land is such that an encroachment may not come to the notice of officials until many years after it has been started. If this argument is accepted, the present rule ought not, perhaps to be criticized on the grounds that it does not encourage due diligence. However, it might be questioned whether a shorter limitation period might not encourage officials to adopt a more active, investigatory role and e.g. to conduct routine inspections of all property. But to justify the time and expense of frequent inspections it would be necessary to demonstrate that a shorter limitation period provided clear benefit. Such benefits must be found (if they exist at all) from a consideration of the final two objectives of the statute.

c. Hardship. The present rule certainly cannot be criticized on the grounds that it is always unfair. Thus, few would normally regard the summary eviction of a deliberate squatter - even after 12 years or more - as a

case of hardship. It is, however, possible to point to cases in which the present rule might operate unfairly. Whether a squatter begins his activities by a deliberate land-grab or as is more likely, starts as a tentative trespasser who, being undisturbed, gradually extends his occasional use of land into something more permanent, it is possible that hardship might actually be caused by the rule. If, for example, after many years undisturbed enjoyment of cultivated land and, misled by non-interference, a squatter develops the land at his own cost, he might well be reasonably regarded as suffering hardship if he were thereafter evicted by virtue only of the extended limitation period available to the Crown.

Similarly, where the adverse possession takes the form of an innocent encroachment on a boundary, it is again perfectly possible that hardship might result to the possessor evicted because of the present rule, despite his long adverse possession. Nevertheless, the possibility that hardship might be caused in some cases to a defendant, is not the sole criterion against which the rule must be assessed. In all cases, it is also necessary to have regard to the hardship to the Crown which would result from a denial of a remedy where, e.g. the Crown was unaware that its rights were being infringed. In the present instance, it seems to the writer that to make any proper assessment of the merits of the rule allowing an extended period to the Crown, the circumstances of the actual cases in which claims outside the normal limitation period are brought by the Crown ought to be considered. There is, unfortunately, no published information on this question.

A request for information was therefore made to the Treasury Solicitor, who conducts litigation on behalf of, inter alia, the Crown Estates, the Duchies of Lancaster and Cornwall and some of the larger landowning central government departments, including the Ministry of Defence. The writer asked to be put in touch with the person in the Treasury Solicitor's

department who was responsible for litigation in which the Crown sought to recover possession of land, or with any official who had conducted on behalf of the Crown, a possession action in which the extended period had been relied on. A representative of the Treasury Solicitor stated in correspondence in reply that:

> "there is really nobody here who is in a very good position to help you. This is because we have not often been called on in recent years to take proceedings where squatters have been in occupation for 12 years or more!"

In conversation, another departmental official stated that they could not recall a single instance in which the Crown had relied on the extended period in recent years.

This is a little surprising when compared with the statement in the 21st Report of the Law Reform Committee (p.42) that "the Treasury Solicitor often has to enforce claims against squatters who have been in possession of Crown Land for more than 12 years". It may, of course, be that there has been, since the date of the Law Reform Committee's Report, (1977), a radical change in the squatting habits of the nation. Or it may be that departmental records no longer enable cases in which the extended period is pleaded to be identified. However, if the special extension is no longer used, there does seem to be a good case for its abolition.

d. Conveyancing Implications.

In this thesis, it has been argued that the desire to simplify, expedite and reduce the cost of investigation of unregistered titles is one of the major objectives of the modern Statute of Limitations. Since the current period for investigation of title under an open contract is shorter than the period allowed to the Crown to recover land, there is a possibility that hardship might be caused in some cases to innocent purchasers. It is conceivable that a purchaser might conduct an impeccable investigation of title from a good root, say, 16 years old, but might later find himself

ejected in a suit brought by the Crown within 30 years of accrual of cause of action.

No doubt such cases will be rare. The hypothesis requires: **(1)** Possession by a squatter (whether original or by succession and whether deliberate or inadvertant) for at least 12 years; and **(2)** that a document - such as a conveyance on sale - capable of forming a root of title, should come into existence in less than 30 years; and **(3)** a subsequent sale to a bona fide purchaser in reliance on the paper title. Such events might certainly occur, but probably not very frequently.

On the other hand, whilst the danger is small, there is little that the cautious conveyancer can do to avoid it. In one ot two areas of the country, the title of the Crown to a general area is so notorious that the knowledgeable local conveyancer will insist on a 30 year title. But Crown land abuts and is frequently intermixed with land in private hands, so that the risk, e.g. at common boundaries, can only be appreciated by someone with special local knowledge. However, in most areas of the country, the risk of a dormant Crown claim is generally believed by conveyancers to be small and as a matter of practice, no precautions are usually taken to guard against it.

In concluding, special reference must briefly be made to the remaining 3 categories of property noted in the summary at the start of this section.

(a) Land acquired by Crown after accrual of cause of action

In this case, the Crown is allowed 30 years from the date a cause of action first accrued to a predecessor, provided that the land is acquired whilst the original limitation period is on foot. [It is thought that once the original period has expired, the predecessor's title will (subject to L.A. 1980, s.18) be extinguished, so that the "predecessor" will then retain nothing which he can transfer to the Crown].

The extension available to the Crown in this case cannot be justified by the reasoning which applies to land owned by the Crown throughout - viz. that the land is remote and uncultivated and that unknown infringements are common. Where the Crown takes by purchase or gift, there seems to be no reason justifying any special extension. In such cases, like all transferees, the Crown ought reasonably to bear the burden of discovering the extent of the property which can be transferred to it with vacant possession.

It has, in the past, been suggested that the present rule relates primarily to bona vacantia and argued that an extended limitation period is justified because, in the nature of things, the Crown or the Duchy cannot be aware of the existence of bona vacantia until someone reports it. But it might be doubted whether this argument can justify the general rule applicable to all property transferred by whatever means to the Crown. And it need scarcely be pointed out that the rule now under consideration would only apply where adverse possession was taken of property which **subsequently**, on a death, became bona vacantia.

The present rule does not apply at all where the adverse possession is taken only **after** the death. In that case, the property would already belong to the Crown and the cause of action would accrue for the first time only to the Crown. It seems doubtful that the category of "land subject to adverse possession which later (within 12 years) passes to the Crown as bona vacantia" is large enough to justify the present special rule.

(b) Land acquired from the Crown after the date of accrual

Here the limitation period is 30 years from the date of accrual or 12 years from date of acquisition.

The writer has seen no argument which purports to justify this special Crown privilege. Possibly, however, the rule might be justified in cases

of voluntary transfer of large tracts by the Crown to other public authorities, in circumstances where it would be unreasonable to expect that the transferee make an immediate detailed inspection of the tracts transferred.

(c) Foreshore

Foreshore raises similar considerations to those dealt with in relation to "remote and uncultivated" land. Indeed, foreshore is little more than a special example of such land. Because encroachment on foreshore may well not come to the notice of officials until many years after it has started, it is said, a specially extended period can be justified.

Foreshore throughout : where property has remained foreshore at all relevant times, the extended limitation period probably does little harm.

(i) Staleness. It would require wholly exceptional circumstances for a Crown grant or long lease or licence of foreshore to perish from all knowledge within 60 years. The danger of staleness is not therefore a paramount factor in this case.

(ii) Diligence. Although foreshore may be remote and encroachments may not come to light for many years, it seems unlikely that a period as long as 60 years is absolutely essential for the security of Crown property. A period of this length, which can have little or no effect as an encouragement to prompt action, is so long as to amount to a virtual exception from the effects of the Act.

(iii) Ensuring confidence. One objective of the Statute which has been identified and discussed in this thesis is the desire to ensure that a person may feel confident, after the lapse of a given period of time, that an incident which might have led to a claim against him is finally closed.

It is true that, in the present context, the Act does fix "a given period". But whether it is a period in which a possessor can frequently take comfort is doubtful. It must be an exceedingly rare case in which a single individual can himself establish adverse possession of foreshore and 60 years later,

live to see the statute expire in his favour. And where a succession of individuals are involved, the very length of the limitation period is likely to lead to difficulties on points of evidence dealing with alleged acts of possession, of necessity, at least 60 years old.

In this instance, therefore, it is submitted that the Statute cannot effect the general objective of "ensuring confidence".

(iv) Conveyancing Implications. Where the land in question has remained foreshore throughout, the conveyancing position is straightforward, although likely to be expensive if conducted on the basis of a transaction at arms length.

The general presumption in favour of the Crown's right to foreshore is notorious, (**A-G v. Richards** (1795) 2 Anst. 603) at least amongst conveyancers. And foreshore is not usually difficult to distinguish from other land.

It is clear, therefore, that a purchaser would be at risk if he chose to accept proof of title over only a relatively short period. Since the risk is clear, it can be avoided, e.g. by insisting on production of the Crown grant if any, and proof of all dealings over the last 60 years.

Former foreshore vested throughout the Crown : where a cause of action has accrued whilst property is foreshore and the property thereafter ceases to a foreshore (e.g. by alluvion which is not accretion) alternative periods are prescribed by the Act. The limitation period in such cases is either 60 years from accrual of cause of action or 30 years from the land ceasing to be foreshore, whichever expires first.

The extent to which this rule accords with the general policy objectives of the Statute does not require separate detailed treatment since the issues are very much the same as those raised in previous sections dealing with Crown land in general and with property which remains foreshore throughout. It ought perhaps to be said that in the case of former

foreshore, it is not quite so easy for a purchaser to avoid the danger of a concealed Crown claim. In the case (probably rare) in which the status of land as "former foreshore" is not apparent from either the paper title or on physical inspection, a purchaser might see no reason to extend the normal period for proof of title. The limitation period for the Crown would nevertheless be at least 30 years.

Foreshore acquired from the Crown : in this case, the limitation period is 60 years from accrual or 12 years from date of acquisition, whichever expires first.

It has been suggested that the justification for this rule is that without it, the Crown would not be able to dispose of foreshore, since upon completion the purchaser might find that he had acquired nothing because he could not resist a claim based on adverse possession which would not have been maintainable against the Crown.

This argument, at first sight scarcely tenable, does in fact have a realistic basis. The argument seems untenable at first sight because normally it is quite reasonable to expect a purchaser to inspect his purchase. Any adverse possession ought then, normally, to be discovered. At first sight, therefore, there seems to be no justification for the present provision. However, the provision might be useful in cases where the Crown Estates Commissioners or one of the Duchies choose to transfer e.g. by lease, large tracts of foreshore to other public bodies. This appears to be not infrequent. Halsbury's Laws states that "much of the foreshore, especially in the neighbourhood of the more popular resorts, is held and administered by local authorities under regulating leases from the Crown Estate Commissioners".

In such cases, the proviso in question can reasonably avoid both unnecessary expense on transfer and unnecessary loss of Crown property.

B. Ecclesiastical and Eleemosynary Corporations Sole

The exceptions in favour of corporations sole can be dealt with summarily, because they do not impinge significantly on the operation of the Statute.

Summary

a.	Land owned throughout by any spiritual or ecclesiastical corporation sole	30 years from accrual.
b.	Land acquired by such a corporation after accrual	30 years from accrual to predecessor
c.	Land acquired from such a corporation after accrual	30 years from accrual or 12 years from acquisition, whichever expires first.

These provisions were retained in 1980 on the recommendation of the Law Reform Committee on the grounds that

> "it would be virtually impossible for the Church to attempt to keep track of the ownership of all the parcels of land, often in remote areas where such problems are more likely to arise, during the incumbency of each of its Ministers".

In practice, the effect of these provisions is likely to be reduced almost to nil in the next few years. The reason is that little land remains nowadays vested in corporations sole.

(i) Eleemosynary Corporations Sole

Such Corporations can be created by Royal Charter or by Act of Parliament or might exist at common law or by custom. Although the Charity Commissioners do not keep any separate register or record of Eleemosynary Corporations Sole, it is believed that few exist or continue to be vested with land and that it is unlikely that more will be created. The exception in favour of such corporations does not therefore appear to materially affect the general operation of the Statute.

(ii) Spiritual Corporations Sole

A leading work on Charity Law states that

> "The only ecclesiastics who are corporations sole are those from the Church of England. So, in descending order of rank, an Archbishop, a Bishop, a Prebendary or Canon, some Deans, an Archdeacon, a Rector (or Parson), a Vicar and a Vicar Choral are each a corporation sole. Rectors and Vicars of new beneficiaries created by pastoral schemes are also corporations sole".[19]

But whilst these corporations sole may continue to exist, little land remains vested in them. The process of transferring church lands to corporations aggregate was underway in the 19th Century and still continues today, with the comparatively recent Incumbents and Churchwardens (Trusts) Measure 1964 and more recently still, the Endowments and Glebe Measure 1976 which vested glebe land in Diocesan Boards of Finance as from 1st April 1978.

The result of this process of legislative transfer, is that F.W. Maitland's prophesy is now very nearly fulfilled:

> "I think it not rash to predict that ... Churches and glebes will some day find their owners in a corporation aggregate or in many corporations aggregate".

In fact the only significant sorts of land which can remain vested in corporations sole are churches, church yards, burial grounds and parsonage houses - all types of property which are unlikely to be subject to a modern claim to a possessory title.

In summary, by 1990 (12 years from transfer of glebe in 1978) the exceptions in favour of spiritual and eleemosynary corporations sole will be so limited as to have almost no effect at all on the general operation of the Statute.

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19. Picarda, Charities, p.331.
20. The Corporation Sole, Selected Essays, 1936, p.103.

II The limitation period and the length of abstracts

This second section of Chapter 12 considers a special topic which goes a little outside the terms of the Statute itself. It deals with the nature and extent of the connection between the length of the limitation period and the period for which title must be proved under an open contract. It does so by tracing the history of the relationship between the two periods.

In this thesis, it has been suggested that a major policy objective of the law of limitations governing claims to recover land is to shorten, simplify and reduce the cost of investigation of title to unregistered land. So far, two means of proof have been presented in support of this hypothesis; **(1)** that the policy can be collected from the reports of the various Commissions and Committees whose investigations led to the enactment of the modern statute; and **(2)** that the policy can be deduced to some extent from the provisions of successive statutes, some of which cannot be explained in any other way. It is now submitted that a third means of proving the hypothesis and a gauge of the extent of the connection between length of the limitation period and the length of the general period of proof of title under a contract for sale of land, can be found by tracing the way in which reform of the statute and successive reductions in the limitation period have affected the period for proof of title. The story falls naturally into a number of sub-sections.

(a) The Real Property Commissioners First Report

In Chapter 3 of this thesis, it was pointed out that the Real Property Commissioners, in their first report, saw clear connection between the length of the limitation period and the period for which a prudent purchaser must investigate title:

> "Although a claim can seldom be set up after 20 years adverse possession, the instances, however, rare, in which this occurs, render all titles questionable to the extreme limit ever allowed; and upon the sale and mortgage of land, it is necessary that every title should be strictly examined for nearly a century ...
> This is the main cause of the length of abstracts necessary to be laid before conveyancers ..." [1] (emphasis supplied)

This statement in the Commissioners' first report does require some explanation.

At the time of the first report, it was clearly established that an abstract ought to show a title for at least 60 years.[2] But a more remote commencement was necessary in several instances. Tyrrell, an eminent conveyancer and later himself a member of the Commission, noted in evidence that this was common and was necessary because either an abstracted instrument gave notice of prior instruments (important by virtue of the equitable rule that notice of an instrument is notice of all its contents), or because old terms were in existence (the "outstanding terms" device was outline in Chapter 3, above) or because it was discovered that an entail may have existed. [3]

Thus, although the minimum period was fixed at 60 years, in many cases a much longer investigation was necessary. Tyrrell's own opinion, with which the equally eminent conveyancers on the Commission obviously agreed, was that the average period for investigation was about 100 years.[4]

Abstracts of this length, the Commissioners thought were:

> "a growing evil which calls loudly for remedy".[5]

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1. Real Property Commission, First Report, 4.
2. **Barnwell v. Harris** (1809) 1 Taunt. 430;
   Farrand, Contract & Conveyance, 3rd ed., 92.
3. Real Property Commision, First Report, Evidence, p. 327, 515.
4. Real Property Commission, First Report, p. 41;
   Tyrrell, Evidence to R.P.C. 327, 515; cf. Sugden, II, V & P., 10th (1839), p. 135.
5. First Report, p.41.

And having found a cause and effect, the general remedy which the Commissioners identified was the shortening and making uniform of the period of limitation.

In the light of subsequent events, (in particular the subsequent debate amongst conveyancers as to the effect of the R.P.L.A. 1833 on the minimum period for proof of title), it is worth noting at this point that it is not at all clear that the Real Property Commissioners intended that their recommendations should necessarily result in a reduction of the minimum period for proof of title under an open contract for sale. It is clear that the Commissioners did not think that their recommended reduction in the maximum limitation period from 60 to 40 years would automatically reduce the period for proof of title to 40 years. For they themselves pointed out that:

> "to guard against the fabrication of fee simple titles by persons in possession under particular estates, it will still be requisite to investigate titles for a greater number of years than the period of limitation which may be prescribed". [6]

The changes recommended by the Commission were not therefore intended automatically to reduce the minimum period to correspond with the longest limitation period. Probably, the Commission did not intend to affect the minimum period at all. After all, the minimum period of 60 years was a fixed rule sanctioned by the Court and not easily changed otherwise than by Statute.[7] If the Commissioners had intended to affect the rule of law which established the minimum period, it seems likely that their report would have specifically dealt with the issue and would have recommended direct legislative change. The absence of any such recommendation suggests strongly that no change in the **minimum** period was intended.

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6. Loc. cit.
7. Hayes, Conv., 5th, (1840), 291.

But what then did the Commissioners intend to achieve? It is beyond dispute that the Commission did intend that their reforms should have at least some effect on the "growing evil" of lengthy abstracts, although not perhaps on the minimum period for proof of titles. The explanation would seem to be that the Commissioners intended primarily to reduce the average rather than the minimum period for which titles had to be investigated.

The following remark in their First Report seems to reveal this:[8]

> "... we think that some diminution of the evil (i.e. lengthy abstracts) will be produced by shortening and making uniform the period of limitation ..."

It seems to the writer to be very significant that in this passage the Commissioners talk, not of fixing or reducing the minimum period for proof of title, but rather of lessening the growing "evil" which they had previously identified as the current length of most abstracts. It is therefore suggested that the main thrust of the reforms of 1833 were directed to reduce the average, rather than the minimum period appropriate under an open contract.

After this digression to deal with the objectives of the reformers of 1833, it is possible to go on to the second stage of the modern history of the relationship between the limitation period and the period for proof of title.

(b) The Grand Debate

The passing of the R.P.L.A. 1833 immediately gave rise to a vigorous dabate, principally amongst conveyancers, on the effect of the Act. The debate was concerned mainly with the question of whether the new Act had affected the minimum period for proof of title under a contract which was silent on the point.

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8. First Report, p.41.

Sir Edward Sugden led the speculators in the 9th edition of Vendor and Purchaser, published in 1834. Sugden's argument was that the old period of 60 years had been fixed by reference to the period of limitation applicable to real actions. Since the law of limitation had now been radically reformed, and the maximum limitation period (in cases of disability) was 40 years, Sugden thought that in the future:

> "40 years will probably be considered the proper period instead of 60 for an abstract to extend over".[9]

There were other conveyancers who were also clearly of the same mind as Sugden.[10]

However, a very vocal opposition quickly established itself. P.B. Brodie, a noted conveyancer, who had been a member of the Real Property Commission from the first, wrote an opinion in practice[11] which was subsequently printed as an appendix to the first edition (1833) of William Hayes' Introduction to Conveyancing.

In this opinion, Brodie rejected Sugden's major premise, that the length of abstracts was fixed with reference to the old limitation period of 60 years. Brodie asserted, on the contrary, that the period was fixed by reference to the duration of human life. Since the 1833 Act did not affect the length of human life and since a remainderman expectant on an estate for life could not be barred before his interest fell into possession, Brodie reasoned that a purchaser was still entitled to require a 60 years' title.

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9. At. p. 329.
10. See e.g. **Cottrell v. Watkins** (1839) 1 Beav. 361; Hayes, 5th (1840) 281.
11. This "opinion" was described cynically by Sugden as being rather "an argument written ... with a view to being published". See V. & P., 10th, (1839), p.136.
12. See also J. Lee, Abstracts, London, (1843), 178.

The positions taken up by both Sugden and Brodie were open to criticism. Sixty years was certainly the period of limitation for a writ of right; but (before the R.P.L.A. 1833) it was certainly not a perfect protection as against reversioners or remaindermen, or persons under disability; nor was the writ of right applicable in all cases in which a 60 years title was required by conveyancers.[13]

The 60 year limitation period for a writ of right is not likely therefore to have been the only reason for the conveyancers practice of demanding proof of title for at least 60 years. On the other hand, Brodie's theory that the period was fixed only by reference to the length of human life was equally untenable. First, 60 years was neither an average nor the figure traditionally assigned as the span of human life. Second, a 60 year title was in fact no guarantee against the precise danger which Brodie used as an illustration.[14] If absolute security was required against the possibility of a claim by a remainderman after a life estate, then a 60 year title was not sufficient. A purchaser seekeing absolute security ought logically to investigate, not just for a minimum of 60 years, but for the extreme limit of human life, plus the period allowed by law under the rule against perpetuities for the suspension of vesting of estates,[15] plus a further period to allow the Statute of Limitations to operate.

But if criticism could be levelled at the arguments advanced by both Sugden and Brodie, a much more convincing explanation for the origin of the "60 year's title" was that offered by William Hayes in his 'Introduction to Conveyancing'.[16] Hayes rejected the idea that the rule governing

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13. Hayes, Conv., 5th (1840) 281; Jarman, 9 Conv. 417, suggested that the 60 years limitation period was the origin of the conveyancers rule, and that the dangers had simply been overlooked.
14. Sugden, V. & P., 10th (1839) 136.
15. Byth & Jar., Conv. Prec., 3rd (1841) by Sweet, Vol. 1, p. 61.
16. Argument most fully expounded in 5th ed. p. 281.

the length of abstracts was fixed by direct reference to the length of human life.[17] And he would accept that there was originally only a limited connection between the 60 year limitation period and the conventional period for proof of title to land. In his view, the limitation period for a writ of right had probably originally suggested the 60 year period to conveyancers. But it did not alone explain the practice. Hayes cogently argued that no period of investigation, however extended, guaranteed absolute security of title before 1833. His view was that the 60 years rule was based on little more than the experience of conveyancers which had established that it was in practice sufficiently safe and convenient:

> "There can be no mathematical certainty of a good title, but there may be a strong moral probability, and it was thought that the favourable result of a scrutiny, prosecuted through the res gestae of the last 60 years, afforded that probability. The more extended the period of research, the greater is the assurance of safety; but convention required and practice has established, a conventional limit".[18]

Hayes' position, therefore, was no more complex than that 60 years title was sufficiently lengthy to provide a reliable indication of good title and to make any earlier and better titles so unlikely as to be no real risk. For Hayes, the length of the limitation period before 1833 was one element in this calculation, but nothing more.

Since, in Hayes' view, the governing principle in fixing a conventional period for investigation of title was the need (if absolute security could not be had) for at least "a strong moral probability" of security, he did not believe that the statutory abolition of the real actions and the reduction of the maximum limitation period to 40 years (in cases of disability) had automatically resulted in a shortening of the title period to 40 years. For Hayes, it was still necessary to apply the same governing principle

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17. Op. cit.283, 290.
18. Op. cit. 282.

after the 1833 Act to discover what period ought to be regarded as the minimum for proof of title.

Now after the 1833 Act came into effect - as this thesis has attempted to demonstrate - it certainly could not be said that a single period of 40 years was an absolute guarantee that all possible outstanding claims were barred. Although the 1833 Act had effected fundamental reforms, there were still a number of instances in which old claims could be made. For contemporary lawyers, the most important of these instances and the greatest risk remaining after the 1833 reforms was from a claim by a remainderman or reversioner after a life estate:

> "The vendor's title may commence 40 years or 60 years ago with a simple conveyance in fee from A to B; but A or his predecessors in title, may have dispossessed C, a tenant for life, or A himself may have been merely tenant for life, or tenant pur auter vie : in either case, if the life is still in existence, or if it has dropped within 20 years, or if, having dropped 20 years ago or upwards, the right of the remainderman or reversioner has been kept alive by any disability ... the purchaser, accepting title must be in imminent danger of eviction".[19]

Because of this risk, Hayes argued that the rule requiring a 60 years title ought not, for safety's sake, to be changed. Clearly, Hayes was right to draw attention to the theoretical risk posed by reversions and remainders.

Ultimately, however, as will be seen, the professional concensus was that the degree of risks caused by remainders was not great enough to justify the conclusion for which Hayes argued. Nevertheless, Hayes' argument was (and continues to be) important as a clear exposition of the principle that the period for investigation of title depends upon the two factors of convenience and degree of risk.

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19. Hayes, Conv., 5th (1840) 283.

In the 10th edition of Vendor and Purchaser (1839) Sugden expressed his views at greater length and went some way to accepting part of Hayes' argument. In this edition, Sugden recognized that 60 years would not bar all claims and was merely a period "of sufficient duration to meet any probable outstanding claim depending upon the duration of even a long life". Nonetheless, Sugden continued to differ from Hayes in that he believed that the risk of accepting a title shorter than 60 years had been reduced by the R.P.L.A. 1833, and that consequently, the minimum period for proof of title could also be reduced. He though it would be safe in practice to accept a 50 years title in ordinary cases.

However, despite Sugden's eminence and the high regard in which his Vendor and Purchaser was held, the general opinion of the profession in the years immediately after the 1833 Act seems to have supported his opponents.[20] Indeed, his opponents themselves noted that the practice of conveyancers and of the Masters in suits for specific performance continued unaltered by the Act of 1833.[21] Thus matters stood until 1844 when public debate at least was ended by the decision in **Cooper v. Emery,**[22] decided by Lord Chancellor Lyndhurst principally on the grounds advanced by Hayes.

> "It was supposed that, by the operation of that Act (R.P.L.A. 1833), it was not necessary that the title should be carried back, as formerly, to a period of 60 years, but that some shorter period would be proper. It appears that conveyancers have entertained different opinions on the subject; but, after considering it, I am of the opinion that the Statute does not introduce any new rule in this respect; and that to introduce any new rule shortening the period would affect the security of titles. One ground of the rule was the duration of human life;

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20. Sugden, Concise V. & P. (1851), 265.
21. Hayes, Conv., 5th ed. (1840) p.285: Byth & Jar. op. cit. 60.
22. (1844) 1 Ph.388; See also **Moulton v. Edmonds** (1859) 1 DeG.F. & J. 246.

> and that is not affected by the Statute. It is true that, in other respects, the security of a 60 years title is better now than it was before. But I think that is not a sufficient reason for shortening the period - for adopting 40 years; or, as has been suggested by a high authority (Sugden), 50 years instead of 60. I think the rule ought to remain as it is, and that it would be dangerous to make any alteration".

The decision in **Cooper v. Emery** therefore put an end to the debate about the rule governing minimum period for proof of title under an open contract. But to say that, as the next section will show, is very far from saying that the R.P.L.A. 1833 had no effect whatsoever on the period for proof of title.

(c) Conveyancing Practice after **Cooper v. Emery**

After the decision in **Cooper v. Emery**, it was beyond dispute that the R.P.L.A. 1833 had not affected the rule governing the minimum period for proof of title under an open contract. There were those who, as a result, thought that the efforts of the Real Property Commissioners had been in vain

> "I am very much afraid that one of the objects of the legislature in passing the Act of Limitation referred to, namely, that of shortening the period of deducing titles, has not been effected, in consequence of the construction put upon that Statute".[23]

With benefit of hindsight, this judgment seems both premature and unduly pessimistic. For it seems strongly arguable that the 1833 Act did affect investigation of title in the following 3 ways.

(1) After 1833, it was generally agreed that, even if the 60 years minimum rule had not been affected, nevertheless 60 years was now a much more secure title.[24]

The Commissioners had therefore this undisputed comfort, if nothing else.

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23. **Hodgkinson v. Cooper** 9 Beav. 309.
24. Hayes, 5th, 293; 9 Jar. Con. 417, 8;
Cooper v. Emery, cited above; Sugden, Concise V & P, (1851), 265.

(2) Second, and a little more speculatively, it is also arguable that the 1833 Act did in fact achieve the Commissioners' main objective, which it was suggested (above) was to reduce the **average** rather than the **minimum** period for proof of title.

As to the position before the Real Property Limitation Act 1833 was enacted, the conveyancer Tyrrell, in evidence to the Commission, noted that for various reasons it was often necessary to investigate title for much more than 60 years. The principal reasons for this which Tyrrell identified were the equitable doctrine of notice and the danger arising from remainders after the estate tail.[25] It was Tyrell's opinion that the average length of abstracts

> "might be reduced by about half if the period of limitation be reduced to 20 years, and were extended to remainders after estates tail, and the interference of equity on the ground of notice were prevented".[26]

The Commission recommended action and legislation resulted on each of these 3 issues. First, the limitation period was reduced to 20 years, except in cases of disability. Second, time was made to run against issue in tail and remaindermen as soon as it began to run against a tenant in tail. And a defective dissentailing assurance was to be cured and bar remainders after 20 years possession. Third, and finally, the Statute was extended to equitable rights and, as explained in Chapter 10 (Trusts) time was made to run (even in the privileged case of express trusts) from the moment of conveyance to a purchaser, irrespective of notice.

The comparison made in the previous paragraph between the position before the R.P.L.A. 1833 and the position afterwards suggests that the principal reasons for prolonged investigation of titles were removed by the 1833 Act.[27]

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25. Real Property Commission, Examinations and Evidence, p.327.
26. Loc. cit.
27. This was noted, albeit elliptically, in contemporary legal literature: see Sugden, V.& P., (10th), 1839, 135.

In summary, there are grounds for believing (a) that the main object of the Legislature in 1833 was to reduce the **average** length of abstracts and (b) that the technical reforms necessary to achieve this were in fact introduced.

It remains to be seen whether a shortening of abstracts occurred in practice as a result. It is suggested in the following paragraphs that it did, and that this is the third way in which the 1833 Act affected practice.

(3) Length of Abstracts : practice after 1844. There is a little evidence (noted above) that between 1833 and 1844, practitioners continued to insist on at least 60 year's title, as they had done before the R.P.L.A. 1833.

However, after 1844 and the re-affirmation of the 60 year rule applicable to open contracts, there is evidence of a change in attitude on the part of practitioners to the need for a 60 years title. Professor Farrand[28] states that:

> "in the mid-nineteenth century the wind veered and conditions shortening the sixty-year period became common".

Joshua Williams[29] similarly noted, writing of the period before 1874, that in practice, purchasers were generally willing to accept a 40 year title.

However, by far the most comprehensive source of evidence for the practice (in the mid-19th century) of shortening the 60 year period by special conditions, is that provided by the 1870 Report of the Land Transfer Commission. That Report is unequivocal:

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28. Contract and Conveyance, 3rd. ed., 1980, p.92.
29. Real Property, 1880, 13th ed.

> "The evidence is quite unanimous in this respect, that purchasers never get, or require a 60 years title. ... The inference we draw from the evidence is, that a 40 years title is the maximum now required by a prudent purchaser, and that the average of titles do not extend further back than 30 years at most".

These conclusions were based on an analysis of the answers of leading firms of solicitors throughout the country to questions put to them by the Commissioners. "Freshfields" answer was typical of many:

> "We should, under ordinary circumstances, advise a title commencing 40 years back with a good root to be accepted".[30]

This statement, when compared with the Real Property Commissioners view that the average length of abstracts was 100 years, shows the dramatic change in practice which had occurred around the middle of the 19th century. But was this change the result of the R.P.L.A. 1833?

Whilst it is impossible to speak with certainty on this point, it seems to the writer to be highly likely that the change had some connection with the practical effect of the 1833 Act. It seems probable that as the effects of that legislation were worked out in practice, experience showed practitioners that the degree of risk in accepting a title of between 30 and 40 years was negligible. It certainly seems to have been generally agreed that the risk was negligible. The 1870 Commissioners themselves concluded that:

> "We have it also clearly established, that there is no substantial risk by a purchaser with a recent title". [31]

Now it is impossible to prove conclusively that it was the Statute which made a 40 years title a safe proposition. But it is significant that contemporary lawyers themselves drew a clear connection between reform

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30. Land Transfer Commission, 1870, Evidence, 60.
31. Op. cit. p.xx.

of the Statute of Limitations and reduction in the period for proof of title:

> "Every reduction in the periods of limitation ... pro tanto, facilitates the transfer of land". [32]

It seems, therefore, reasonable to suggest that after 1833, the Statute did ultimately affect abstracts and the length of titles and enabled the average period for proof of title to be reduced to a period of less than 60 years.

(d) The legislation of 1874/5

The 1870 Report of the Land Transfer Commission (mentioned above) led in 1874 to the introduction of the bill which eventually became the Land Transfer Act 1875. The bill was first introduced in the House of Lords on the same day (26th March 1874) as two other reforming bills which together formed a legislative package designed to facilitate the transfer of land. The two other bills eventually became the Real Property Limitation Act 1874 and the Vendor and Purchaser Act 1874. The former reduced the basic limitation period for actions to recover land to 12 years, with extensions of up to 30 years in cases of disability. The latter reduced the minimum period for proof of title to 40 years, although it remained possible to contract for some other period. In view of their common parentage and design,[33] it would be difficult to deny a connection between the two measures. Probably the reduction in the limitation period was intended to facilitate the contemporaneous alteration in the statutory period for proof of title, [34] which in any event coincided with common practice of purchasers (although possibly not of all mortgagees or trustees) solicitors.[35]

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32. W.H. Charley, The Real Property Statutes, 3rd, 1874; and see Sugden, Concise V. & P., 1851.
33. See the speech of Lord Selborne, L.C., introducing the bills, Hansard, 3rd series, Vol. 218.
34. Law Commission, 1967, Root of Title Report, para. 17.
35. Williams, Real Property, 13th ed., 1880.

There was, however, no immediate reduction in the period of limitation available to the Crown and to spiritual and eleemosynary corporations sole which remained fixed at 60 years until the Limitation Act 1939. Nor was there any change in the position of persons entitle to future interests; time did not run against reversioners (e.g. after a life interest) until their interests fell into possession. It was for this reason that in 1878 the Select Committee of Land Titles and Transfers rejected the argument that the new 12 year limitation period justified a further reduction in the period of proof of title.[36] The danger of a concealed claim by a reversioner meant that investigation of titles must still cover the extended limitation period available to claimants under disability. However, the excuse fielded by the Select Committee that the period for investigation of title still "depended on the estimated duration of human life" ... was now wearing a little thin.

As has been seen, the 60 years title rule was originally justified on the same argument. Forty years was a period well short of the theoretical maximum necessary to deal with all risk of a remote vesting.[37]

In truth 40 years was no more than the period which, before 1874, was judged sufficient by practitioners to guard against any reasonable risk of an unbarred claim.[38]

The reduction in the limitation period effected in 1874, although it certainly strengthened a 40 years title, had done nothing directly to affect

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36. See Cretney, (1969) 32 M.L.R. 477, 479.
37. The necessary period for "absolute" security would be the maximum duration of life, plus 21 years (perpetuity) plus 30 years, (claimant under disability).
38. Scott Committee - The Acquisition and Valuation of Land Committee (1915) - p. 7.

the problem of reversions expectant on life interests. The Select Committee's cautious attitude to further reduction of the Statutory period for proof of title was therefore probably justified.

(e) 1911

The period between 1874 and 1911 again saw a dramatic change in the practice of conveyancers. It was noted above that in 1870, 40 years was regarded as a practical maximum and 30 years was a common and probably the average period for investigation of title. In 1911, however, evidence submitted to the Royal Commission on the Land Transfer Acts led that Commission to conclude that: [39]

> "the general practice in the matter of investigation of title was materially altered since the Act of 1875. ... Titles extending back anything like 40 years are hardly ever conceded on contracts for sale or insisted upon on mortgages".

The 1911 Royal Commission was of course principally concerned with proof of title on applications for registration. But one of its incidental recommendations was that the general period for proof of title between a vendor and purchaser should be reduced from 40 to 20 years.

(f) 1939

The Limitation Act 1939, on the recommendation of the Law Revision Committee (1936), consolidated previous limitation legislation. The Law Revision Committee's report did, however, suggest some amendments at least one of which specifically recognised a connection between the limitation period and the period for proof of title of land. After noting briefly the history of the period for investigation of title and that the current period (30 years) was shorter than the limitation period available to the Crown and to corporations sole, the Committee suggested that:

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39. 1911 Report, Cd. 5483.

> "it may cause hardship if claims can be enforced in respect of a cause of action which arose before the commencement of the period during which the purchaser is investigating title".

Accordingly, the Committee recommended reduction these limitation periods to 30 years, thus bringing them into line with the minimum period of proof of title.

(g) 1969

The Law of Property Act 1969 reduced the statutory period for proof of title under an open contract from 30 to 15 years. This followed the recommendation of the Law Commission which in 1967 published "Transfer of Land : Interim Report on Root of Title to Freehold Land".[40] That report contains perhaps the most thorough official review ever published of the relationship between the limitation period and the period for proof of title to land.

In the relevant sections, the report first traces the outline history of the relationship between the two periods. It then dealt with the standard of protection enjoyed by purchasers under the then existing 30 year rule and considered how that would be affected by reducing the minimum period for proof of title. On this point, in summary, the Law Commission's report noted 3 ways in which reduction of the 30 year period might prejudice a purchaser. First, a change to a period shorter than 30 years, would give rise to a greater risk that investigation of title might fail to reveal rights to which an extended limitation period was applicable (i.e. claims by the Crown, a spiritual eleemosynary corporation sole or a person under disability). Second, there was an increased risk that an investigation might fail to reveal the rights of a lessor or an estate owner or trustees which might be enforceable even after long possession, since the limitation period

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40. Law Commission, 1967, Report No. 9.

does not run against the owner of an interest in remainder or reversion or other future interest until that interest falls into possession. Third, a shorter period would increase the risk that a purchaser would be unable to discover the names of all owners of the land since 1925, and so would be unable to discover registered land charges, which would nevertheless be enforceable.[41] (This risk was to be guarded against by a compensation fund).

However, despite having clearly acknowledged that there were dangers, the Law Commission nevertheless went on to recommend that the statutory period for investigation of title under an open contract be reduced to 15 years. They did so on the basis that the prevailing opinion amongst conveyancers in general practice (although not perhaps amongst conveyancers at the bar),[42] was that the risks discussed were small and acceptable in most transactions. This view was evidenced, not only by those whom the Commission consulted, but also by the contemporary practice of conveyancers, which the Commissioners stated was:

> "that a root of title considerably less than 30 years old is now frequently accepted in the ordinary, lower-priced, house purchase, whereas estate developers and others with a special need of a secure title generally insist upon a least 25 years".[43]

The Committee's recommendation of a reduction to 15 years for proof of title was accepted by the Government and eventually found its way into the Law of Property Act 1969. It was worth noting at this point that the Commission also suggested that the limitation rules which caused the particular risks mentioned above (i.e. the special rules applicable to the Crown, to corporations sole and to trusts) ought to be reviewed at

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41. This risk was to be guarded against by a compensation fund.
42. (1966) Sol. Jo., 11 and 18 March.
43. Op. cit., 15.

some time in the future. Re-examination of these rules was included in the general review of the law conducted by the Law Reform Committee (21st Report), but no changes were recommended or made.

II Conclusions

In the opening part of this section it was suggested that tracing the respective histories of the rules governing (1) the length of the limitation period and (2) the period for proof of title under an open contract would demonstrate that the two are connected and, further, that shortening the former has been designed to shorten the latter.

In concluding this section, it is submitted that the tracing process shows:

(a) that there is no direct correspondence between the length of the limitation period (or the longest period available in special cases) and the period for proof of title. The two periods are not and have not been identical because in certain exceptional cases, to avoid possible hardship to certain claimants (e.g. reverioners/remaindermen/beneficiaries in equity/persons under disability) it has not been thought desirable to allow the Statute of Limitations to run from the commencement of adverse possession. The period fixed for proof of title has therefore had to take account of these exceptional cases and has not therefore simply adopted the statutory limitation period as the appropriate period for proof of title.

(b) However, there has undoubtedly been a very strong connection between the statute and the period for proof of title. As the history of the legislation shows, reforms in the law of limitations and in particular, reductions in the length of the limitation period, have resulted in progressive shortening of the period for investigation of title. On 3 occasions since 1833, statute has reduced the minimum period applicable under an open contract either concurrently with or as a result of a prior reduction in the limitation period. But despite this substantial history of legislative reform,

it is arguable that Statute has not been the most important means of reduction in the **average** period for proof of title. It is strongly arguable that the practice of conveyancers has been more important. It was the practice of conveyancers which first gave practical effect to the reforms of 1833. It was again the influence of conveyancers which first gave practical effect to the reductions in the limitation period made in 1874 and 1939. Statutory reform on this topic seems at times to have merely followed where practice has led. It is therefore scarcely too much to say that it has been the influence of practical conveyancers which has been the dominant factor in all reductions in the period for proof of title since 1833.

But whether or not the crucial role of conveyancers be conceded, the factors which at all times since 1833 seem to have governed the length of the period for proof of title have been:

(1) the length of the basic limitation period for actions to recover land;

(2) the degree of risk presented by exceptional cases falling outside (1) above;

(3) the extent of protection provided to purchasers etc., by other rules designed to simplify or expedite conveyancing. For example, the effect of L.P.A. 1925, s.44 (8) in confining the equitable doctrine of notice to the statutory period for investigation of title (with exceptions) has had a similar effect in shortening investigation of title (and on the enforcement of old claims) as the limitation provision (R.P.L.A. 1833) which barred equitable claims against a purchaser after 20 years irrespective of notice;

(4) Convenience. The practical convenience and the relative costs of investigation of title is the final factor which of course plays a part in

influencing the period for which titles ought to be or are in fact investigated.

In these circumstances, it is clear beyond dispute that the length of the limitation period is not the only factor which governs the period for investigation of title. It is, nevertheless, a highly important consideration. So important, that it is submitted that it can be said that the two periods are in fact connected and for reductions in the limitation period to be designed to reduce the period for investigation of all titles.

PART V

CHAPTER 13

EFFECT OF LAPSE OF TIME

Introduction

This chapter deals with the effect of the expiration of the limitation period on the rights and title of the person against whom time has run. The following chapter deals with a related question, the nature of the title acquired by the party in favour of whom time has run.

(A) General

It is today trite law that, with two exceptions,[1] at the end of the period prescribed by the Statute for any person to bring an action to recover land, no such action can thereafter be brought and the title of that person to the land is automatically extinguished.[2]

While the effect of lapse of time has always been to bar the remedy, the Statute has not always had the further effect of extinguishing the right. Before the enactment of the R.P.L.A. 1833, lapse of time merely barred the remedy; it did not also extinguish the right or title.[3] The result, at that time, was that if the person against whom time had run could peaceably get into possession otherwise than by action, his title revived and became enforceable once again.[4] This rule was objectionable. It gave rise to uncertainty since it made the security of property depend on whether, by accident or contrivance, a barred claimant could re-enter peacably. With the aim of clearing titles of such uncertainty, the rule was altered on the recommendation of the Real Property Commissioners, by the R.P.L.A. 1833, s.34.

The modern rule, therefore, is that lapse of time bars both the remedy and the title in the case of actions to recover land. This has important consequences. For in general, once a title has been extinguished, it cannot be dealt with,[5] asserted,[6] or revived.[7] However, this general statement requires qualification. The Statute provides only one general rule of extinguishment which is made to do service for all kinds of interests in land.

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1. 1980 Act, s.17; settled land and land held on trust, and registered land.
2. 1980 Act, s.15 and s.17.
3. **Hunt v. Burn** (1702) 2 Salk. 422.
4. See e.g., **Doe v. Read** (1807) 6 East 353.
5. **Eastwood v. Ashton** [1915] A.C. 900. The Statute also achieves this result by virtue of the rule that no land action can be brought more than 12 years from the date when the cause of action first accrued to him or to some person through whom he claims (1980) Act s.15). A person is treated as claiming through another if he became entitled by, through, under or by the act of that other person to the right claimed (1980 Act, s.38 (5)).
6. **Sykes v. Williams** [1933] 1 Ch.285.
7. **Brassington v. Llewelyn** (1858) 27 L.J. Ext.297; **Bryan v. Cowdal** (1873) 21 W.R.693; **Sanders v. Sanders** (1881) 19 Ch.D.373, C.A.; **Irish Land Commission v. Ryan** (1900] 2 I.R. 565, C.A.; **Nicholson v.England** [1926] 2 K.B.93.

It deals not only with the straightforward case in which the squatter dispossesses an owner in fee simple absolute, but also cases where several titles are involved, as where the property is let.[8] This last instance gives rise to peculiar difficulties. It is necessary to examine it in more detail.

(B) Leases

The Statute of Limitations may, in certain circumstances, operate against a lessor as well as against a lessee.

However, the most difficult question which has emerged in connection with extinction of titles - quite possibly the most difficult of all the questions which the Statute has provoked - is the effect of the legislation when the limitation period has barred the right of a tenant. The problem is easy to pose. At the end of the limitation period, the Statute provides that the title of the time-barred party shall be extinguished; when, therefore, a tenant for years had been ousted by a trespasser who has remained in occupation for the statutory period of limitation, what is the effect on the lease?

Although the question is not difficult to pose, it is not at all easy to answer. Probably there is no completely acceptable solution to it. It is true, of course, that in 1962 in **Fairweather v. St. Marylebone Property Co., Ltd.**[9] the House of Lords provided a reasonably comprehensive answer to the problem, at least so far as concerns unregistered titles. In doing so, it reconciled a long-standing conflict of authority in the Divisional Court between **Walter v. Yalden** (1902)[10] and **Taylor v. Twinberrow** (1930).[11] Nevertheless an examination of that and of other possible solutions is required for two reasons. First, because (at least in theory) decisions of the House

8. Other "multi-title" cases are trust property (Chapter 10) and land subject to a mortgage (Chapter 9).
9. [1963] A.C. 510.
10. [1902] 2 K.B. 304.
11. [1930] 2 K.B. 16.

of Lords are no longer indisputable in perpetuity.[12] Second, and more important for present purposes, because this thesis seeks to measure the rules of limitation applicable to claims to recover land against the general policy objectives of the Statute. A detailed consideration of the effect of the Statute on the title of the time-barred lessee is therefore required.

The possible effects of section 17 of the 1980 Act ("Extinction of title to land after expiration of time limit") on a lease can be summarised as follows:

At the end of the limitation period, either

(1) the lease is totally extinguished for all purposes; or

(2) it is only partially extinguished i.e., only extinguished for some purposes or as against some persons. If this is correct, then the extent of the rights remaining after extinguishment must be discovered and two subordinate questions arises:

(a) To what extent, if any, are the rights of the lessor affected by partial extinction.

(b) What rights, if any, remain exercisable by the tenant and with what effect.

Each of these questions must be considered in turn.

1. "Extinguished" means "totally extinguished".

Although "extinguished" probably does mean "totally extinguished" (at least in effect), where an estate in fee simple absolute is concerned,[13] scarcely anything at all has ever been said in favour of the view that, where time has run against a lessee, the lease is thereafter extinguished for all purposes. The consequences (listed below) of such a view have made it seem grotesque[14] and hence untenable. The following things would seem

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12. Practice Direction [1966] 1 W.L.R. 1234. In the light of established criteria, however, **Fairweather** seems an unlikely candidate for early review: **Fitzleet v. Chery** [1977] 3 All E.R. 996; **R v. National Insurance Commissioner, ex.p. Hudson** [1972] 2 W.L.R. 210.
13. **In re Jolly** [1900] 2 Ch.616; **Eastwood v. Ashton**, cited above.
14. Professor H.W.R. Wade (1962) 78 L.Q.R.541, 545.

to be the result of such an argument.

(a) If the lease is totally extinguished, then the landlord's right to possession would accrue on that event.[15]

The general scheme of the Act is of course that time does not run against future interests until such interests fall into possession on the determination of the preceding estate or interest.[16] If the effect of lapse of time on a lease were to extinguish it completely, it is difficult to see how that could be anything other than a "determination of the preceding estate" which would accelerate the lessor's interest and turn his reversion into an interest in possession against which time would immediately start to run.

If this were to be the law, it would have serious and unfair consequences on lessors. As Lord Radcliffe pointed out in **Fairweather,**[17] the landlord might then be barred

> "although the lessee was continuing throughout the period to pay the rent under the lease and....(even though) the landlord had neither the means of knowing nor reason to know that dispossession of part of the premises had taken place or that time was running against him. This seems quite wrong".

Such a rule would of course significantly improve the quality of the legislative guarantee of security of title which the Statute gives to purchasers of unregistered land. It would do so because it would mean that within a relatively short period (as little as 2 x 12 = 24 years) outstanding rights could be cleared from titles. It would also considerably reduce the risk faced by all purchasers (discussed in chapter 8 above) that concealed behind a root of title lies an unexpired long lease. However, as the instances put by Lord Radcliffe in the passage just quoted show, such security would be achieved at a high price. Such a rule would create undesirable insecurity

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15. See **Fairweather v. St. Marylebone** [1963] A.C. 510, at p.538 (Lord Radcliffe).
16. L.A. 1980, sched.1, para. 4.
17. See Fairweather (cited above) at p.538 (Lord Radcliffe).

for landlords. It might therefore be doubted whether it would be sound policy to insist on such a rule with the object of increasing security of title on transmission of interests in land, if the effect of so doing were to seriously impair the security of current enjoyment of land. It seems wrong to favour the "transmission interest" in property, if the price is the serious weakening of "the enjoyment interest".

In fact, there is no reason to suppose that Parliament ever intended that the "transmission interest" should so heavily predominate over the "enjoyment interest". On the contrary, (as this thesis attempted to show in chapter 8, "Landlord and Tenant") there is every reason to believe that the founding fathers of the modern scheme of limitation of actions to recover land, intended that time should not run against a lessor until the lease expired by the natural means contemplated by the lease or the general law of landlord and tenant.

The Real Property Commissioners in their first report deliberately rejected the idea that in general time should run against a lessor not from the end of the lease, but from the commencement of adverse possession. They seem to have been persuaded that time could not normally be allowed to run against lessors because it would be unreasonable to expect lessors to protect themselves. Continuous vigilence could not be expected from someone without a present right. It would also, in many cases, be difficult or impossible for a lessor to discover whether his interests were being threatened or whether time was running against him. But the legislation would produce precisely this result if "extinguished" in relation to a lease were held to mean "totally extinguished for all purposes",[18] for in that event, once time had run against a lessee, a determination of the lease would take place,

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18. Cf. **Fairweather** (cited above) p.554 (Lord Morris, dissenting).

the lessor's reversion would become an interest in possession and time would immediately begin to run against the lessor. All this might occur without the lessor being any the wiser.

In these circumstances, it is difficult to believe that Parliament ever intended that "extinction" of a lessee's title should mean "total extinction for all purposes". Such an interpretation would, by a side-wind, subvert the intentions of the original framers of the legislation.

There is also a further reason which points strongly towards the conclusion that "extinguished" does not mean "totally extinguished".

(b) If the lessee's estate is totally extinguished for all purposes, there disappears with it any privity of estate between lessee and lessor. If this is the case, then as Lord Radcliffe has explained [19]

> "If privity of estate is gone so are gone the covenants[20] on the part of the lessee which depend on such privity; if the current lessee is an assignee of the lease, as he is likely to be if the term in question is a long term of years, the landlord will find himself deprived by Act of the legislature of the right to enforce in respect of the squatter's portion of the land a set of covenants of value to him and he will have been so deprived without compensation or any necessary notice that the event that brings it about has in fact taken place."

As Lord Radcliffe commented, this is a strange statutory scheme. But this result could not logically be avoided if (but only if) "extinguished" were to be interpreted as meaning "extinguished for all purposes and in all relations". [21] This possible result therefore also points strongly to the conclusion that "extinguished" does not bear the suggested meaning.

In summary, the logical consequences of an argument that "extinguished" means "totally extinguished" would be so unfair and oppressive that the

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19. **Fairweather**, at p.539.
20. The unspoken implication being that covenants which depend on privity of contract are not destroyed; cf. Wade (1962) 78 L.Q.R. 541, 545.
21. **Fairweather**, p.538 (Lord Radcliffe); cf. Lord Morris (p.554).

the argument itself becomes untenable. Indeed, it is noteworthy that in the leading case of **Fairweather v. St. Marylebone Property Co. Ltd.** it was accepted by all parties as well as by all the members of the Court of Appeal and House of Lords that the legislation only achieved something less than total extinguishment. There was, of course, considerable difference of opinion as to what the precise effect of the Statute was. These differences are considered in the following part of this chapter.

2. "Extinguished" means "partially extinguished"

In **Fairweather**, two possible types of "partial extinguishment" were debated.

(a) On the one hand, it was suggested that the Statute provided for extinguishment of title, so far as the lessee was concerned, the lease remaining good in all other respects. In argument, this suggestion was formulated (on behalf of the squatter) as, "the title of the leaseholder is extinguished but his estate in the land is not."[22]

(b) On the other hand, it was argued that the Statute extinguished the title of the lessee as against the squatter, but not as against the freeholder.[23]

For the reasons mentioned above, each suggestion is now considered in turn:

(a) The Statute extinguishes title but not estate

In essence, the suggestion here is that once time has run, the leasehold estate continues to exist, but that the time-barred lessee no longer has any right to it. The suggestion is not that the lease is extinguished: nor that it is transferred to the squatter. It is simply that the title of the lessee to the lease is extinguished, so that in effect an unvested, or floating estate is created.

This theory has been forcefully criticized in England. It has been pointed

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22. This view has since been adopted by the Supreme Court in the Republic of Ireland: **Perry v. Woodfarm Homes Ltd.** [1975] I.R. 104.
23. In **Fairweather**, this view was taken by a majority of both the Courts of Appeal and the House of Lords.

out[24] that the theory (if correct) postulates a quite novel conception, that of an estate which is:

> "like Peter Pan's shadow, unattached to anyone, and remains in vacuo until it comes back to the landlord (at the end of the lease)".[25]

Nevertheless, if correct, this theory could explain why time does not begin to run against a lessor from the moment his lessee is barred. The answer to that problem would be that only the lessee's right to the leasehold estate had been extinguished, not the estate itself. Consequently, the lessor's estate would still be, for limitation purposes, a future interest and so time would not begin to run against it.

This theory would not, therefore, automatically prejudice the lessor. Further, the lessor would remain able to enforce covenants in the lease where privity of contract exists and to exercise any power of re-entry contained in the lease.

The theory would also be favourable to a squatter. If the lessee's title to the estate is extinguished, then naturally his right to deal with that estate is also extinguished. As a result, the lessee would not be able to effect a surrender of an interest to which he had no right.[26] Nor, it would seem, would he be able to determine a periodic tenancy by notice or to achieve a merger if he purchased the immediate reversion.[26] However, although this theory would be attractive to a squatter, it contains the seeds of its own destruction. It is open to the following objections:

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24. **Fairweather**, p.538 (Lord Radcliffe); p.544 (Lord Denning).
25. **Fairweather v. St. Marylebone** [1962] 1 Q.B. 498, 515, C.A. (Holroyd Pearce L.J.). But see the riposte, (1962) 18 L.Q.R. 39 - R.E. Megarry - pointing out that the alternative conception of a title good against a lessor but bad against a squatter is equally tortuous. It should be added that the Supreme Court in the Republic of Ireland found no difficulty with the conception - **Perry v. Woodfarm Homes** [1975] I.R. 104.
26. See **Perry v. Woodfarm Homes** Ltd., cited above.

(i) If the lessee's title is extinguished, then all privity of estate must also disappear with it. There cannot really be privity of estate where there is only one privy - the reversioner on a lease to which no one is entitled.[27]

There is no direct English authority in point. However, there is an analogy. Before the rule was amended by statute, a similar problem might arise if a leaseholder made an underlease and then surrendered his term to the freeholder. On the surrender of the head lease, that lease was merged or "drowned" in the freehold, although the surrendered estate was deemed in law to continue so far as the under-lease was concerned. Nevertheless it was held that the effect on the under-lease was that

> "privity of estate (between lessee and under-lessee) was destroyed ... so that a sub-tenancy might find himself released from all his covenants ... provided that he was not also liable by privity of contract".[28]

This state of affairs - although long-remedied by statute so far as lawful sub-lessees are concerned - suggests that there can be no privity of estate where there is only one privy.

If this is correct, the Statute of Limitations would deprive a lessor - possibly secretly and certainly without compensation - of the benefit of covenants on the part of the lessee which depend on privity of estate for enforcement.[28a] This is scarcely acceptable. It casts great doubt on the validity of this second theory of the meaning of "extinguish".

(ii) A second objection to the notion that the Statute extinguishes **titles** but not **estates** is to be found in the mechanical difficulties which would

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27. In the Irish Republic, the Supreme Court in **Perry** (cited above) ignored this difficulty and simply asserted that the lessee remained liable on covenants in the lease (Walsh J. and Griffin J; Henchy J. dissenting).
28. Megarry and Wade, Real Property, 4th, p.738, citing **Webb v. Russell** (1789).
28a. This may not be an objection in Ireland, where Deasy's Act seems to make enforceability of covenants depend on contract, not estate; **O'Connor v. Foley** [1906] 1 I.R. 20, 27.

be caused in the case of leases from year to year, as well as other forms of periodic tenancy.

If the effect of the Statute on a lessee is to extinguish his title to the lease and to put an end to his right to deal with it, then consequently, he can no longer be entitled to determine it by serving a notice to quit. If it is not his lease, then he cannot end it.

But if the former tenant is no longer the correct person to **give** a notice to quit....can it possibly be said that he is the right person to **receive** a notice to quit from the lessor.[29] And if the former tenant is not the right person to **receive** a notice to quit (and there is a nice air of unreality about the idea of a notice to quit something which the recipient does not have), then who is? Certainly not the squatter, unless perhaps the "Parliamentary Conveyance" heresy is to be revived.[30]

If, as is normally the case, service of a notice to quit is essential to determine a periodic tenancy and if the effect of the Statute is that the tenant can no longer either give or receive one, then two things follow. First, the lessor will be perpetually bound by the lease and unable ever to determine it and recover possession. Second, the original lessee may be perpetually liable in contract on the original covenants in the lease without the ability to limit liability by determining the lease.

These problems do not appear to have been considered in detail in any reported case.[31] It was, however, asserted by Lord Morris (dissenting) in the House of Lords in **Fairweather**[32] that it remained open to a lessor to determine a periodic tenancy by notice to quit served on the former tenant.

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29. Cf. Lord Morris (dissenting) in **Fairweather**, (cited above) at p.556.
30. Discussed in the next chapter.
31. Although a similar problem - that of service of notice after a purchase of a freehold reversion by a time-barred periodic tenant - seems to have impressed the Court of Appeal in **Taylor v. Twinberrow** [1930] 2 K.B. 16, and both the Court of Appeal and the House of Lords in **Fairweather v. St. Marylebone Property Co.**, cited above.
32. At p.555.

No reason was given for this view.

It is possible that the mechanical difficulty to which the present theory gives rise in the case of periodic tenancies, is not insuperable. Possibly the difficulty might be overcome by regarding periodic tenancies (after time has run against the lessee) as being determinable at the election or will of the lessor. An analogy supporting this conclusion might exist in the case of a tenant from year to year who has disclaimed his landlord's title. In such a case, no notice to quit is necessary.

> "A notice to quit is only requisite where a tenancy is admitted on both sides, and if a defendant denies the tenancy there can be no necessity to end that which he says has no existence".[33]

If a notice to quit becomes unnecessary where a periodic tenant denies that he has a tenancy, it would not be impossible to construct a rule giving rise to the same result where the periodic tenant's title is destroyed by Statute. It is possible, therefore, that the mechanical difficulty could be overcome.[34] But this solution would only protect lessors. An original periodic tenant, bound to his landlord by contract, would remain at the entire mercy of the latter so far as concerns the length of time during which he is liable on the covenants in the lease. This would certainly be unreasonable in cases in which time has run against the tenant in favour of a squatter without any fault on the tenant's part.

(iii) If the effect of the Statute is to extinguish **titles** but not **estates**, a mechanical difficulty will also arise if a time-barred periodic tenant were to purchase the immediate reversion.

If, when time has run against a tenant, the leasehold estate ceases to be vested in that tenant, then logically no merger of interests could take

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33. **Doe d. Calvert v. Frowd** (1825) 4 Bing.557, per Best C.J.
34. A similar solution might be applied to the case of fixed term leases determinable at the election of the lessor on certain dates - e.g. a 21 year lease determinable by lessor's notice after 7 or 14 years.

place if the tenant subsequently purchases his former landlord's reversion.[35]

It has been suggested that this would cause serious mechanical difficulties. If merger did not take place automatically on purchase of the reversion by a time-barred periodic tenant, then it has been asserted that the periodic tenancy could not thereafter be determined.[36] It appears to have been assumed that if merger did not take place automatically, then service of a notice to quit would be necessary and

"a man cannot serve a notice to quit on himself".[37]

This particular mechanical difficulty appears to have impressed the Court of Appeal in **Taylor v. Twinberrow**[38] and in **Fairweather v. St. Marylebone Property Co. Ltd.**[39]; although it does not seem to have influenced the majority opinion in the latter case in the House of Lords. It is by no means clear that the Court of Appeal ought to have worried about the point, for the following reasons:

(a) First, it seems to have been generally assumed by the Court of Appeal that if a lessee obtains the reversion, merger is automatic. This is incorrect.

At common law, as is well known, merger does take place if the lease and the reversion are vested in the same person in the same right, with no vested estate intervening. However, it is equally well known that in equity merger was not automatic, but depended on intention and did not occur unless intended by the person who acquired the two estates.[40]

Nowadays, by Statute,[41] the equity rule prevails.[42] That rule appears to apply to periodic tenancies just as it does to fixed terms. It does not seem therefore, that the Statute of Limitations gives rise to a special mech-

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35. **Perry v. Woodfarm Homes Ltd.**, cited above.
36. **Fairweather** [1962], at p.512.
37. **Taylor v. Twinberrow** [1930] 2 K.B., at 24 per Scrutton L.J.
38. Cited above.
39. Cited above.
40. See Megarry and Wade, Real Property, 4th, 609.
41. L.P.A. 1925, s.185, replacing Judicature Act 1873, s.25 (4).
42. **Silsby v. Holliman** [1955] Ch.552, where this point was conceded in argument and noted, with apparant approval, by Upjohn J. (p.556).

anical difficulty when a time-barred periodic tenant acquires the immediate reversion.

The same problem of service of notice exists whenever such a transaction takes place and whether or not any limitation point arises.

(b) Second, the Court of Appeal seems to have assumed that a periodic tenancy can only be determined by a notice to quit, which cannot be served once the same hand holds both term and reversion, so that an impasse is reached.

There is room for doubt whether this assumption is correct.

The best way to overcome the difficulty, would be by regarding periodic tenancies in such circumstances, as determinable at the will of the lessor.[43] Other, although less desirable, alternatives have also been suggested.[44] However, even if both the above assumptions are correct, there is still no impasse. A notice could always be served before the tenant buys the reversion. Alternatively if this were overlooked, the purchaser could still pass on the reversion to a nominee on whom a notice could then be served.

The fear, therefore, that the Statute might give rise to periodic tenancies which were impossible to determine seems unnecessarily pessimistic.

(iv) A final point which tells against the theory that the effect of the Statute is to extinguish **title** but not **estate**, is to be found in the wording of the Statute itself. In the modern legislation, the draftsman has used the words "title" and "estate" interchangeably.[45] It seems unlikely, therefore,

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43. Suggested (1962) 78 L.Q.R. 39 by R.E. Megarry.
44. In **Fairweather** [1962] 1 Q.B. 498, 522, Willmer L.J. (dissenting), suggested that a periodic tenant on a merger could be regarded as waiving any right to notice. This will not do as an explanation where the tenant is time-barred; if the tenant cannot deal with the lease, he cannot waive rights under it.

    In the same case in the House of Lords [1962] A.C. 510, Lord Morris suggested that on a purchase of the freehold by a periodic tenant, the tenancy would automatically determine at the end of the next period of the tenancy; but this might make time run against a lessor without his knowledge.
45. Compare L.A. 1980, s.17 ("extinction of title") and s.18 ("extinction of estate").

that a distinction between the two things was originally intended.

Summary - Theory 2 - The Statute extinguishes title but not estate

To summarise, the case against the second theory rests on the undesirable consequences which it is feared would flow from it. Most of those possible consequences could be avoided by a little creativity. However, it does not seem to the writer that, by any means short of legislation, it would be possible to support this second theory, and yet allow the reversioner on a time-barred lease to continue to enforce covenants in that lease which depend on privity of estate for enforceability. The two things are inconsistent. The merits of the theory of extinguishment of title but not estate therefore appear as follows:

(a) As to the lessor; the theory would cause hardship if, as seems unavoidable, it prevented the enforcement of covenants depending on privity of estate.

(b) As to the lessee; the theory would harm periodic tenants bound by contract who would be unable to determine their liability under the lease in the way originally intended.

(c) As to the squatter, the present theory would be advantageous. To support the present theory would clearly be to prefer the interests of the squatter to those of the other parties involved. To assess the case for doing this it is first necessary to have regard to the effects on all the parties of the alternative theory of the meaning of "extinction" (considered next) and then to consider how, if at all, the competing theories accord with the objectives of the law of limitation of actions.

3. The Statute extinguishes the lessee's title as against the squatter, but not as against the lessor.

This theory is the alternative way in which it has been suggested that

the Statute might effect only a partial extinction of the lease. As noted above, this is the theory which has prevailed in England and Wales,[46] although not in the Republic of Ireland[47] whose law of limitations is similar to English law in most other respects. The English rule was deliberately left unchanged when the legislation was reviewed[48] and subsequently consolidated in 1980.

The effect of this theory is that after time has run, a lessee is unable to succeed in an action to recover possession against the lessor. It would also seem to follow that even if the lessee were able to retake possession peaceably e.g. on the death of the squatter, his title would not revive and he could be ejected as a trespasser at the suit of anyone claiming by or through the squatter.[49]

However, the lessee's title nevertheless remains good as between himself and the lessor. Thus, the lessee remains entitled to determine a periodic lease by notice; he remains liable on the covenants in the lease; his lease can merge into the reversion should he acquire it; and the lease remains subject to any right of re-entry which the lessor may have reserved. Further, it seems that if the lessee is able to retake possession peaceably, then as against everyone (including the lessor), except the squatter and those claiming under him, the leaseholder is once again in the same position as he was originally, being entitled to the benefits and subject to the burdens of the lease.[50] Although there is no authority, no doubt the lessee also continues to be able to confer on others (e.g. by assignment or sub-lease) the same rights which he himself possesses.[51]

This third theory of the way in which the Statute operates affects the parties in a rather different fashion:

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46. **Fairweather**, cited above.
47. **Perry v. Woodfarm Homes Ltd.**, cited above.
48. Law Reform Committee, 21st Report, p.44.
49. **Brassington v. Llewellyn** (1858) 27 L.J. Ex.297.
51. Cf. **Eastwood v. Ashton**, cited above.

(a) The lessor; this theory satisfactorily protects the legitimate interests of the lessor.

Since the lease here remains in existence, the lessor still retains only a future estate. Time cannot, run against the lessor until the lease ends. In effect, therefore, the Statute cannot catch the lessor unawares.

Further, since the lease continues to exist so far as the lessor is concerned, he remains able to determine it by any appropriate mode (e.g. by notice or re-entry) and he is not prevented by the Statute from enforcing the covenants in the lease against either the original tenant or any assignee.

(b) The lessee; the present theory treats the lessee the most generously. On any view, if this theory is correct, the lessee retains his duties and at least some of his rights. (The precise extent of these rights is considered under the next leading," (c), The Squatter").

(c) The Squatter. To consider fully the effect of the present theory on the position of a squatter, it is necessary to deal in turn with three of the methods by which a lease can be determined.

(i) Surrender

If the effect of a Statute on a time-barred tenant's title is only to extinguish that title as against the squatter, it becomes necessary to enquire what effect should be given to a purported surrender by such a time-barred tenant.

Two alternative views were suggested in **Fairweather v. St. Marylebone.** On the one hand it was argued for the squatter that a surrender operated as an assignment by the leaseholder to the freeholder for the remainder of the term. If this view had been correct, a freeholder taking a surrender would be a person "claiming through" the leaseholder and would be barred by the Statute until the lease expired by natural means.

On the other hand, it was argued for the freeholder that a surrender operated to determine the term forthwith. On this view, on a surrender, a freeholder immediately has a good claim to possession, not through the lessee, but by title paramount.

In **Fairweather**, the majority in the House of Lords preferred the latter view on the ground, seemingly, that this was to be regarded as the proper effect of a surrender at common law. Lord Denning explained that the well-established theory[52] that a surrender operates as an assignment was the practical result of statutory modification[53] to an original common law rule. The provisions of the statute in question do not apply to squatters. In the view of the majority of the House of Lords, therefore, the original common law idea that a surrender operated to determine a lease prevailed, so far as squatters are concerned.

In fact, Lord Denning's reasoning on this point seems to overstate the case by a very little. Although there can be little doubt that the doctrine that a surrender operates as an assignment was only fully developed as a result of Parliamentary intervention,[54] nevertheless that doctrine did have independent common law origins.[55] The problem seems to the present writer to be that the steps which the common law took towards regarding a surrender as an assignment did not clearly extend so far as to protect squatters. On the technical merits therefore, the question of the effect of a surrender at common law on the estate of a squatter must be regarded as having been open for decision either way. And as Professor H.W.R. Wade (the principal critic of the **Fairweather** decision)[56] has noted, there is no shortage of arguments to support either of the rival solutions, so that their Lordships were faced with a choice of preferred result.

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52. **David v. Sabin** [1893] 1 Ch. 523; **Wheaton v. Maple** [1893] 3 Ch.48.
53. L.P.A. 1925 ss.139, 150.
54. Acts of 1730 and 1845, now consolidated in L.P.A. 1925, ss.139, 150.
55. See Co. Lit. 338 b.
56. (1962) 78 L.Q.R. 541.

In the event, they chose the result which favoured the time-barred tenant at the squatter's expense.

The merits of that choice are considered below.

(ii) Merger

If the effect of the Statute is to extinguish a tenant's title only as against the squatter, and not as against the lessor, then there is no theoretical objection to the merger of interests of lessee and lessor if the former acquires the latter's title. This result was held to be possible in the case of **Taylor v. Twinberrow** [57] and was approved by the House of Lords in **Fairweather v. St. Marylebone Property Co. Ltd.**

(iii) Forfeiture

It is beyond dispute that a lessor can exercise a right of re-entry against a squatter.[58] However, the extent to which a squatter can prevent the occurrence of events giving rise to the right in a lessor to re-enter is a little uncertain.

A squatter may certainly be able to prevent some types of breach of covenant from occurring. For example, if he takes possession of the whole of a leasehold property, he will be able to repair it and prevent a breach of repairing covenant from occurring. It is also clear that there are certain events on which rights of entry may be made to depend, the occurrence of which a squatter will never be able to prevent. If, for example, a tenant covenants not to part with possession, the covenant will necessarily be broken immediately the squatter enters. This is a continuing breach so that time will never begin to run against the lessor on or after a breach of this covenant.

However, one event about which there is some doubt, is the case of forfeiture for non-payment of rent. If the ousted tenant does not pay the

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57. [1930] 2 K.B. 16 (Div. Ct.).
58. **Humphry v. Damion** (1612) Cro. Jac. 300.

rent, then the question arises, can the squatter insist on paying it. A squatter on leasehold property may often be troubled by the danger of forfeiture for non-payment of rent. For if he takes possession of an entire estate, the dispossed tenant will be unlikely to pay the rent to keep the squatter safe. But if the squatter takes possession of any part of an estate, he may himself be unwilling to pay the rent on the whole.[59]

Even if the squatter is prepared to pay, it is by no means clear that he is entitled to do so. In the House of Lords in **Fairweather**, Lord Denning's view was that:

> "If the leaseholder chooses not to pay the rent, the freeholder can determine the lease under the proviso for re-entry. The squatter cannot stop him. He cannot pay the rent without the authority of the leaseholder".[60]

This statement was not, of course, part of the **ratio decidendi**; and it has been questioned. Professor Wade, for example, has rhetorically asked:

> "If the rent is tendered (by the squatter), where is the breach of condition?"[61]

However, the conclusion offered by Professor Wade seems, with the greatest respect, to be doubtful: viz., that if the point were fully argued, it might be held that tender of rent prevented forfeiture as against the person tendering. On the contrary, it seems unlikely that a landlord who has full knowledge of the circumstances, could be held to be bound to accept rent tendered by a stranger. If it were otherwise, a landlord who did accept rent in such circumstances would be at risk of being held either (a) to have created a new tenancy; or (b) to be estopped from denying that the squatter held as

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59. Here the squatter will be vulnerable to the possibility of the whole lease being forfeited, but the Court granting relief to the tenant in respect of all the premises except the part in adverse possession, relief for part being possible nowadays: **G.M.S. Syndicate Ltd. v. Gary Elliott Ltd.,** [1981] 1 All E.R. 619.
60. [1962] A.C. 510, 547.
61. (1962) 78 L.R.Q. 541, 556, see also Wylie (1965) Irish Jurist at p.482.

tenant on the terms of the existing lease.[62] To hold a lessor bound to accept rent from a squatter would therefore, in the writer's view, be tantamount to forcing the lessor to accept the squatter as his tenant.

(iv) Collusion

In an influential article,[63] Professor H.W.R. Wade has argued that it is an open question whether a purely collusive forfeiture would be held effective for the purpose of depriving a third part of a title conferred by Act of Parliament. Professor Wade did not explain, however, how the Court could avoid giving effect to collusion. It is difficult to see how the Court could avoid "collusion" which, in context, must mean a refusal by the tenant to perform obligations in his lease, a refusal on his part to seek relief and an unwillingness on the part of the lessor to allow this state of affairs to continue. If a tenant, for example, simply refuses to pay the rent or to repair, what is the Court to do? If the Court refuses to permit forfeiture, the tenant may still not pay or repair. It is the landlord who would then be prejudiced, as the price of protecting the squatter's Parliamentary title. This does not seem at all satisfactory. It seems likely that the Court would and should give effect to a collusive forfeiture, just as it does in the case of a collusive surrender. Lord Denning in **Fairweather** recognised this; referring to the possibility of a collusive surrender, his Lordship continued:

> "But I would point out that, if we were to deny the two of them this right, they could achieve this result in another way. They could easily do it by the leaseholder submitting to a forfeiture. If the leaseholder chooses not to pay the rent, the freeholder can determine the lease under the proviso for re-entry. The squatter cannot stop him." [64]

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62. Although in **Tickner v. Buzzacott** [1965] Ch.426 Plowman J. held that mere acceptance of rent (**without** knowledge of capacity in which payment made) was not enough to give rise either to a periodic tenancy or to estop the landlord in the way suggested in the text. **Williams v. Heales** [1874] L.R. 9C.P.177; **Rodenhirst v. Barnes** [1936] 3 All E.R.3; **Official Trustee v. Ferriman** [1937] All E.R.85; **Jackson v. McMaster** [1890] 28 L.R.Ir.182, 3, (Palles C.B.).
63. (1962) 78 L.Q.R. 541.
64. Cited above, at p.547.

(v) Relief from forfeiture

Lord Denning also stated, obiter, in **Fairweather**, that a squatter could not apply for relief against forfeiture. Although not unchallenged,[65] this dictum has since been followed at first instance in **Tickner v. Buzzacott.**[66]

In summary, therefore, it is clear this third theory of the effect of the Statute - that "extinguish" means extinguish as between lessee and squatter, but not as between lessee and lessor - is the least favourable to the squatter. Notwithstanding that the Statute has apparently operated in his favour, the squatter remains vulnerable to attack by both the lessor (acting alone) in some circumstances, and by both lessee and lessor acting together, in other circumstances.

The merits of this state of affairs must now be considered.

Does Featherweather subvert the policy of the Statute?

The general policy objectives of the Statute were identifed in Chapter 1 of this thesis. In general it has been suggested that the rules applicable to present interests in land could be explained on the grounds of their tendency to either avoid stale claims, or to avoid hardship or to provide a legislative guarantee of security of title for conveyancing purposes. If those explanations were correct, then since the present theory of the meaning of "extinguished" enables "the squatter's title to be destroyed by the leaseholder and freeholder putting their heads together",[67] it is necessary to see if the consequences of the way in which "extinguished" has been defined, have resulted in the policy of the Statute being subverted.[68]

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65. Wade, cited above, at p.557.
66. [1965] 1 Ch.426.
67. **Fairweather**, cited above, at p.547 (per Lord Denning).
68. J.C.W. Wylie (1965) 16 N.I.L.Q.467, 478, suggests that the decision "virtually nullified the operation of the Statute of Limitations in relation to leasehold land".

The writer's general conclusion is that it has not.

To assess the position, it is necessary to have regard to each of the policy objectives of the Statute in turn.

(a) Staleness

It is possible to conceive of cases in which staleness might prejudice a person who wished to rely on the Statute as against an alleged tenant. A tenant for years might, for example, have dealt with his estate either by assignment or by sub-lease. In either instance, it is conceivable that a stale claim might arise.

(i) Assignment. If a tenant assigned his interest, a stale issue might arise if, years later, the assignee were unable to prove the assignment and were liable to be ejected as a result of a surrender by the assignor to the landlord. But for this to occur (in the absence of fraud) it would require the assignee to lose the lease, and the assignment[69] and for both parties (or their successors) to forget all about the transaction. This is unlikely, but just possible. However, usually on an assignment, the assumption by the assignee of the position of tenant will be evidenced at least by his dealings with the lessor. It is unlikely, therefore, that an assignment would wholly perish from memory and 'unlikely that a defendant in possession could be prejudiced in the way suggested, by a stale claim by a former lessor.

(ii) Sub-lease. It is probably a little more likely that a defendant in possession could be prejudiced by a stale and unfounded claim by his landlord. However, once again, for this to happen (absent fraud) documentary evidence of the lease (the lease itself, or agreement for it) would have to be lost. Acts referrable to the lease (e.g. payment of rent) would have to cease, and knowledge of the letting would have to perish. This is not likely to be a common state of affairs.

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69. Assignments must be by deed; L.P.A. 1925, s.52.

In practice, a stale but unmeetable claim against a person in lawful possession seems unlikely. It therefore seems reasonable to conclude that the fact that a landlord and tenant can "put their heads together" to defeat a possessory title, does not significantly interfere to prevent the Statute fulfilling its objective of barring stale claims.

It is, perhaps, significant to note at this point that in none of the cases in which the question of the effect of a surrender or merger by a barred-tenant has arisen, has there been any dispute or even any question raised which might suggest that a stale claim was being asserted.

(b) Hardship

An old claim might give rise to hardship in a variety of ways. Even the determination of a possession which was originally wholly wrongful might give rise to hardship to the possessor. Expenditure or improvements to the land might have been made, or arrangements made or liabilities incurred, in reliance on a belief by the possessor in his own ownership. These things might have occurred without the possessor having any right or title. For example, it sometimes happens,[70] on the development of a building estate, that the boundaries as defined in the documents do not coincide with the boundaries which exist on the land. In the case of leasehold estates, eminent commentators[71] have pointed out that the **Fairweather** rule means that lapse of time cannot now be regarded as a simple means of reconciling the paper title with the physical boundaries:

> "A simple surrender and regrant between the landlord and one tenant can spell the doom of the neighbouring tenant, without with knowledge".[72]

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70. On both sides of the Atlantic: see **Howard v. Kunto** (Court of Appeals of Washington) (1970) 3 Wash. App. 393, 477, p. 2D.210.
71. (1962) 78 L.Q.R. 38 (R.E.M.); Evidence to Law Reform Committee of Chief Land Registrar.
72. (1962) 78 L.Q.R. 38 (R.E.M.).

Nevertheless, although it is clearly possible for an old claim to cause hardship to the party in possession, it is equally possible for the operation of the Statute to give rise to hardship on the part of the person barred. The range of possible circumstances is so great that (as pointed out in Chapter 1, above), no fixed rule designed to produce the least hardship to the parties before the Court could always produce a satisfactory solution. There is no evidence, in fact, that the general rule contained in the Statute accurately reflects even the general balance of hardship between the litigants.

The fact, therefore, that the **Fairweather** rule (being more favourable to the tenant than to the squatter) might cause greater hardship to squatters than either of the two alternative meanings of "extinguished" which have been discussed in this chapter, cannot be regarded as a serious criticism.

(c) Guarantee of security of title

It was suggested in Chapter 1 of this thesis that one consistent objective of the law of limitations since 1833 has been to provide a legislative guarantee of security of title, with the object of reducing the complexity and expense of investigation of unregistered titles on dispositions.

The rules established in **Fairweather** appear at first sight to reduce the quality of that guarantee. But it is doubtful whether that reduction has a significant practical effect. It was pointed out in Chapter 8, "Leases", that the Statute does not generally attempt to protect a purchaser against the risk that there might be, concealed behind a good root of necessary age from which he has investigated title, an unbarred reversion vested in a lessor who is willing and able to re-enter once his interest falls into possession. Even the most prudent purchaser, therefore, takes subject to this unlikely possibility. Now if the Statute operated on a lessee's interest in such a way as to prevent the lessee from prematurely ending his lease, then of course any innocent purchaser (although still at risk when a lease

expires by effluction or is brought to an end by act of the lessor) nevertheless would enjoy somewhat greater protection whilst the term in fact subsists, than he would otherwise enjoy. The present English rule therefore clearly exacerbates the risk faced by all purchasers. However, it is suggested that the risk to a purchaser of an outstanding lease is itself in fact so small (see chapter 8, Leases) that the exacerbation caused by **Fairweather** actually makes no practical difference whatsoever.

Although no empirical evidence is available to support this conclusion, the practical experience of conveyancers in the 20 years since the decision in **Fairweather** is most material. That experience suggests that the rule in **Fairweather** does not cause real risks in practice. Claims to recover possession from an innocent purchaser, which are made by an original lessor after a "conspiracy" between lessor and lessee are unknown in practice. Although such claims, if made, would be likely to receive considerable publicity, no such cases appear in the Law Reports or in legal periodicals. Nor were any drawn to the notice of the Law Reform Committee when the recent review of the law of limitations was conducted. The absence of professional knowledge of such claims strongly suggests that the risk to purchasers is insignificant.

On balance, it does not seem that the theory that the Statute extinguishes only in a relative fashion produces disadvantages for conveyancing practice which outweigh its benefits to lessor and lessee.[73]

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73. A different conclusion might well be justified in Ireland where the Statute: "has played a vital role in regularising informal transfers of ownership, e.g. where a farmer dies but no representation is taken out to his estate" (J.C.W. Wylie, Irish Land Law, (1975) p. 848). As Griffin J. pointed out in **Perry v. Woodfarm Homes Ltd.**, [1975] I.R. 104, 129, "If the majority decision in **Fairweather's Case** is to be followed (in the Republic of Ireland) it would have a very far reaching effect. Until comparatively recent years, raising representation in the case of small farms was quite rare, the occupiers preferring to rely on the Statute of Limitations, and there must be very few agricultural holdings in this country in which at some time in the past 140 years a tenancy was not "acquired" under the Statute". See also **Rankin v. McMurtry** (1889) 24 L.R. Ir. 290.

CHAPTER 14

THE NATURE OF THE TITLE ACQUIRED

Introduction

This chapter deals with the nature of the title vested in a person in whose favour the Statute of Limitations has operated.

At least three general theories of the nature of a squatter's title have been postulated. They are:

(a) The "Parliamentary Conveyance" doctrine;

(b) The "Commensurate Estate" theory; and finally

(c) The notion of "independent title".

Each must be examined in turn in order to identify existing law and then, more important for present purposes, to see the extent to which each theory is consistent with the policy objectives of the Statute of Limitations.[1]

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1. The first of the three theories - "Parliamentary Conveyance" - is of course bound up with the issues considered in Chapter 13 (dealing with time and meaning of extinction of title) because on one view, now discredited, the effect of the Statute was not merely to extinguish the title of the former owner, but also to transfer it to the person in possession, so that at the end of the limtation period the squatter becomes the assignee or transferee of the former owner.

(A) The "Parliamentary Conveyance" Heresy.

This doctrine, now completely discredited in England and Wales, had its origins in a statement made by Sugden (afterwards Lord Chancellor St. Leonards) when he was Lord Chancellor in Ireland. In his judgement in **Incorporated Society v. Richards**[2] he said, obiter, referring to section 34 of the R.P.L.A. 1833:

> "Under the New Act when the remedy is barred the right and title of the real owner are extinguished, and are in effect transferred to the person whose possession is a bar".

Sugden developed his idea that, in some way, "extinguished" in the Act actually meant "transferred" shortly afterwards in the case of **Scott v. Nixon.**[3] In that case Sugden was concerned with the question whether a purchaser would get the legal estate in fee simple by a conveyance from a squatter without the concurrence of the person who would have been entitled but for the effect of the Statute.

> "I have heard nothing to displace the observation which has been made that the Statute does not operate by a mere bar of the remedy, that it does not work so imperfectly, it bars the estate itself; and if so, where can the right be but in the person whose possession the Statute prevents from being interrupted? I am clearly of opinion that by the effect of the Statute after the proper period of limitation has passed the legal fee simple is in the party who has been in possession during that period and that he is competent to convey it to another".[4]

Later, in his final judgement in the same case, Sugden returned to the point saying:

> "It was said in this case that the Statute of Limitations only operated as a defence but could never be held to confer a title, and I was asked where or in whom was the legal title. I reply, the Statute has executed a conveyance to the party whose possession is a bar. The Statute makes the title, for by its operation it extinguishes the right of the one party, and gives legal force and validity to the title of the other - the party in possession.....The Statute has by its own force not only extinguished any right which the heir could have had, but has transferred the legal fee simple to the party in possession, for the legal estate must be in

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2. (1841) 1 Dru. & War. 258, 289.
3. (1843) 3 Dru. &War. 388.
4. At page 405.

> him whose possession has barred the right of every other person....A better equitable title there could not be, but the purchaser is not bound to take an equitable title. My opinion, however, is that the title has been, by operation of the Statute, clothed with the legal estate, and therefore that he is bound to take it."[5]

Although Sugden referred to the point in subsequent cases[6] as well as in successive editions of his textbooks,[7] the statements quoted above from **Scott v. Nixon** represent the fullest and most positive version of what has been called "Sugden's paradox",[8] the idea that the Statute at one and the same moment can both extinquish something and nevertheless also transfer the thing extinquished. It is true that from the first, Sugden had some judicial support for the views attributed to him, including apparantly Parke B. (afterwards Lord Wensleydale) who is reported in **Doe d. Jukes v. Sumner** (1845) as stating that

> "The effect of the Act is to make a parliamentary conveyance of the land to the person in possession after that period of 20 years has elapsed".[9]

Sugden's idea of a Parliamentary transfer also received some judicial approval, particularly in Ireland,[10] at a later period. Nevertheless, Sugden himself seems to have been both the originator and the most persistent promoter of the notion, which, as Meredith pointed out,[11] he continued to employ for nearly 30 years.

What is to be said for and against it?

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5. At page 406-8.
6. **Tuthill v. Rogers** (1844) 1 Jo. & Lat. 36, 72; **Burroughs v. McCreight** (1844) 1 Jo. & Lat.290, 303. **Trustees of Dundee Harbour v. Dougall** (1852) 1 Macq. 317.
7. Vendor and Purchaser, 9th ed., (1834), Vol.1, p.409; 10th ed., (1839), Vol.II, p.330, 14th ed., (1862), p.476; Practical Treatise on the new Statutes relating to Property, 2nd (1862), p.9.
8. (1918) 34 L.Q.R. 253, (Arthur C. Meredith).
9. 14 M.& W. 39,42.
10. In England; **Dawkins v. Lord Penrhyn** (1877) 6 Ch.D. 318, 322; **Bolling v. Hobday** (1882) 31 W.R. 9,11. In Ireland; **Rankin v. McMurtry** (1889) 24 L.R. Ir. 290; **Mulcaire v. Lane-Joynt** [1893] 32 L.R. Ir.683; **Re Hayden** [1904] 1. L.R.1.; **O'Connor v. Foley** [1906] 1 I.R. 20.
11. (1918) 34 L.Q.R. 253,256.

The case for Sugden's "Parliamentary Conveyance"

The case for the idea that the Statute transfers a time-barred owner's interest to a squatter rests simply on the fact that, if the estate is transferred, then any rights which exist by virtue of or which are incidental to that estate will continue to exist and will also be transferred to the person in whose favour time has run. This, it might be argued, would advance the objectives of the Statute. If the Statute prevents a possessor being ousted after a fixed period, and does so in order to avoid stale claims, hardship and to simplify investigation of title in the interests of cheap and speedy conveyancing, then arguably the Statute ought also to ensure that the land can be fully enjoyed by the person relying on it.

It might be argued that the Staute would do this best by ensuring that an adverse possessor is entitled to all the rights which the time-barred owner had in fact enjoyed, these being the rights which are probably the most necessary or convenient for the enjoyment of the land. Thus, if the former owner of Blackacre was entitled to an easement - a right of way - over adjacent Whiteacre, then Blackacre can probably be best enjoyed by an adverse possessor if that person is also entitled to use the right of way. And this result could be achieved if the Statute of Limitations were seen to operate by way of conveyance or transfer. (Indeed, if the Statute does not operate as a transfer so that a squatter does not acquire a necessary easement, the land may be effectively rendered useless.[12]

Other examples of situations in which adoption of the "Parliamentary Conveyance" doctrine would produce advantageous results for an adverse possessor, can be easily collected. One example might be found in the case of restrictive covenants. The existence or non-existence of a restrictive

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12. As in **Wilkes v. Greenway** (1890) 6 T.L.R. 449.

covenant held for the benefit of land may, in some cases, have an enormous effect on the value of that property. Thus, if the former owner of Blackacre was entitled to the benefit of a restrictive covenant (as being annexed to his property) over neighbouring Whiteacre, then a squatter on Blackacre would succeed to that benefit if the Statute transferred the former owner's estate to him; but not otherwise. So also if the former owner of Blackacre was a limited owner or a tenant; if e.g., the squatter succeeded to a tenancy, then he would acquire, at the expense of the former tenant, the right to possession of the property for the remainder of the lease.[13]

A further illustration is provided by cases such as **Scott v. Nixon,**[14] where the person relying on the Statute is in fact a person beneficially entitled to the property; e.g., a purchaser in possession who has paid the purchase price but not taken a conveyance.

In such cases, treating the Statute as a "Parliamentary Conveyance" would enable the Act, in effect, to get in the outstanding legal estate, cure the conveyancing defect and so quiet or perfect the title. Finally, if the Statute operates as a conveyance, then it may have the effect of conferring valuable statutory rights to which the former owner was entitled.[15] In all these cases, there would be advantages (to someone) if the Statute operated by way of transfer or conveyance.

The case against the doctrine of "Parliamentary Conveyance"

Although the case in favour of the doctrine of a "Parliamentary Conveyance" can be quickly put and illustrated, there is rather more to be said against it.

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13. The former tenant would then if this were the law, no longer be able to effect a surrender. But for the problems which such a rule would cause, see below, under 'Case against Sugden's Parliamentary Conveyance'.
14. Cited above.
15. **Rankin v. McMurtry**, cited above; **Jackson v. McMaster** (1890) 28 L.R. Ir. 176.

(a) **The doctrine is ill-founded.**

The Statute itself is of course entirely silent on the nature of the squatter's title and on the rights which the latter acquires. The Statute deals in fact only with the effect of passage of time on the old owner's title. The case for the "Parliamentary transfer" doctrine therefore rests on nothing more than a very special interpretation of the word "extinguished" which, if the doctrine is to be upheld, has to be found to mean "transferred". The first criticism of the doctrine must be that it is ill-founded.

Meredith[16] succinctly made all the relevant points:

> "How, we may ask, can you reconcile extinguishment and transfer? Extinguishment imparts annihilation; transfer imparts continued existence. In short, if the section extinguishes the right, it cannot transfer such; if it transfers, it cannot extinguish. Further, suppose this apparent logical inconsistency removed, how do you extract transference out of extinguishment?"

What answer would Sugden have given to Meredith's questions?

Two possible answers have been suggested.

First, it has frequently been said that Sugden might not have intended his words to be taken at face value - that in talking of a Parliamentary Conveyance he was speaking metaphorically.[17] Certainly some support for this can be found in Sugden's own words. In **Incorporated Society v. Richards,**[18] Sugden says only that the title is **in effect** transferred. So also in **Tuthill v. Rogers.**[19] In these cases, Sugden does not speak of actual or direct transfer. Baron Parke's remarks in **Doe d. Jukes v. Sumner**[20] (quoted above) can also be explained in the same way.[21] But **Scott v. Nixon**[22] cannot be so easily

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16. (1918) L.Q.R. 253, 255.
17. **Rankin v. McMurtry,** cited above, per Gibson J. at p.302. **Tichborne v. Weir** (1893) 67 L.T.735, 737; **O'Connor v. Foley** [1906] 1 I.R.20, 26; **Atkinson and Horsell's Contract** [1912] 2 Ch. 1,9.
18. (1841) 1 Dru. & War. 258.
19. (1844) 1 Jo. & Lat. 36.
20. Cited above.
21. Although widely quoted, Baron Parke's statement (obiter) has all the appearance of a remark made only in passing, coming as it does as an isolated single sentence at the end of a judgement concerned wholly with another point.
22. Cited above.

easily explained. Sugden's judgement in that case suggests that an actual transfer is effected by the Act.[23] In the light of the language used, the writer would suggest that, at least in the later cases, Sugden was probably not speaking metaphorically and intended his remarks to be taken (as they were) at their face value. But the riddle is then to discover how (if at all) Sugden extracted "transfer" from extinguishment.

Only one reasoned attempt has ever been made to do this. Writing in 1918,[24] Arthur C. Meredith pointed out that before 1833 in one area of common law - in connexion with a release by a disseisee of his right - the word "extinguish" could be taken to mean "transferred". Meredith suggested that Sugden, as a former conveyancer and eminent land-lawyer, would naturally give "extinguishment" a meaning with which he was familiar.

Although this seems the best that can be done for Sugden, the argument itself is extremely tenuous. "Extinguished" only meant "transferred" in this one particular area of common law and then only because of the convoluted history of that area of law - the meaning suggested is not the inevitable or even usual meaning of the word at common law. Nor does the attribution of the argument to Sugden seem convincing.

An explanation which seems to the present writer to be more likely is that Sugden, being well aware of a deficiency in the frame of the R.P.L.A. 1835,[25] tried to solve the problem by forcing on the word extinguished a meaning which it could not properly bear.[26] In doing so, he built a doctrine on foundations which did not exist. The doctrine itself, arguably, gave rise to problems just as great as those which Sugden was attempting to avoid. It is the problems to which the doctrine gives rise which must be considered next.

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23. As do his remarks in **Burroughs v. McCreight** (1844) 1 Jo. & Lat.290,303, and **Trustees of Dundee Harbour v. Dougall** (1852) 1 Macq. 317.
24. (1918) 34 L.Q.R. 253.
25. I.e. the uncertainty about what "extinguishment" actually means - see Chapter 13.
26. It is generally accepted that the construction was overstrained. **Tichborne v. Weir** (1893) 67 L.T. 735 (per Bowen L.J.), followed in **Taylor v. Twinberrow** [1930] 2 K.B.16,23.

(b) **Transfer of Liabilities**

The most serious criticism which can be levelled against the Parliamentary Conveyance doctrine is that the consequence of adoption of the doctrine would be to transfer certain liabilities from the former owner, to the person in possession at the end of the Statutory Limitation period. It would do this even where the person in possession was aware of neither the liability nor of the fact that time was running in his favour. The facts of the leading case of **Tichborne v. Weir**[27] illustrate the problem.[28]

A freeholder in that case let a house for 89 years at a yearly rent, and with an obligation on the tenant to repair. The tenant created an equitable mortgage of the lease and defaulted. The mortgagee took possession and the lessee/mortgagor disappeared. After 20 years, the Statute had run against the lessee/mortgagor in favour of the mortgagee, who later assigned his interest. When the lease expired, the lessor brought an action against the assignee of the mortgagee on the covenant to repair.

The assignee was clearly not an express assignee of the lease at law. The question was therefore whether the Statute had transferred the lease to the equitable mortgagee. If it had, he had become the tenant and was liable on the covenants by virtue of privity of estate, as his assignee would be after the moment of assignment.

On the facts of the case, both the mortgagee and assignee were aware of the terms of the lease and knew that the Statute had operated.[29] Nevertheless, the danger presented by a lease in a case like **Tichborne v. Weir** is clear. If the Statute operated as a transfer of the estate, it may incidentally transfer with it extensive liabilities - liabilities which may be more

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27. (1893) 67 L.T. 735.
28. See also Dart, Vendor and Purchaser, 6th ed., Vol.1, p.463: "If the Statute operated as sort of involuntary alienation of the estate of the rightful owner, the adverse possessor would take it subject to subsisting charges".
29. (1893) 67 L.T. 735, 737.

extensive than the value of the land itself to an innocent purchaser. The dangers of an automatic transfer of liabilities are so great that the Statute cannot reasonably be interpreted as having this effect.

(c) **Transfer might prejudice third parties**

If the idea of a Parliamentary Conveyance or transfer were correct, in some cases the very fact of the transfer might operate to prejudice a third party. If, for example, land is held on lease and time has run against the tenant in favour of a stranger, then if the Statute transferred the lease to the stranger, the lessor might find himself unwittingly saddled with an undesirable tenant. Of course, a lessor might avoid this danger by insisting on an unqualified covenant against assignment or parting with possession when granting any lease. The reservation of a right of re-entry on breach of this covenant would be a complete protection to the lessor. However, lessors are by no means always able to insist on such rights when negotiating leases; it might be unreasonable in many cases to insist on such reservations as a protection against the bare possibility of a squatter taking possession. And if a lessor did not protect himself by taking the necessary covenants and reserving the necessary right to forfeit, then a statutory assignment of the lease to a squatter might operate very unfairly by depriving the lessor of rights against a lessee of substance and substituting rights against a man of straw.

(d) **"Parliamentary Transfer" theory not comprehensive.**

A final objection to the idea that "extinguished" in the Statute means "transferred" is that the theory is not comprehensive and does not fit easily with established principles of land law relating to estates by possession.

The theory of "Parliamentary transfer" suggests that the squatter takes no interest at all in the land until time has fully run against the owner, whose title is thereupon extinguished. In other words, the theory seems to indicate that for 12 years less a day, the squatter has no rights in the land at all. On the following day he acquires, by virtue of the Statute, the whole title of the time-barred owner. This is inconsistent with the general notion of the nature of title to land. The better modern view is that possession[30] gives the possessor a title to the land in fee simple[31] which can be defended against trespassers and recovered from interlopers, as well as devised or sold and conveyed.[32]

Now, if a squatter takes a title in fee simple by possession on going into possession at the very start of the limitation period, then the Statute cannot sensibly be seen as thrusting some other (and possibly lesser) title on him at the end of the period. The doctrine of a Parliamentary conveyance is therefore inconsistent with the modern notion that possession gives a title.

The theory of a Parliamentary conveyance also fails to be comprehensive. It does so because it is impossible to apply the theory (i) to cases which are excepted from the effect of section 17 of the 1980 Act, ("extinguishment") and (ii) to cases where a succession of squatters hold the land during the limitation period.

(i) Section 17: in the case of settled land and land held on trust for sale, the title of the legal owner is not automatically extinguished at the

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30. Not, as formerly, seisin. Cf. Hargreaves (1940) 56 L.Q.R. 376.
31. **Asher v. Whitlock** (1865) L.R. 1 Q.B.1: **Perry v. Clissold** [1907] A.C.73; **Ex parte Winder** (1877) 6 Ch.D.696, 701; **Rossenberg v. Cook** (1881) 8 Q.B.D. 162, 165. Williams on Seisin, (1878), pp.7-8, approved, **Leach v. Jay** (1878) 9 Ch.D.42, 44. Pollock and Wright, Possession, pp.22, 93-96; Lightwood, Possession, p.122-126; Megarry and Wade, 4th ed., 1006; Sweet (1896) 12 L.Q.R. 239; Wade (1956) C.L.J. 188.
32. This theory is discussed again, below, under the heading "Independent Title".

end of 12 years, but continues so long as the rights of anyone with a beneficial interest in the land remain unbarred. In this case, therefore, it is apparent that the legal owners retain their right intact and unextinguished - if "extinguished" meant "transferred" then of course no transfer would have taken place and the squatter would still be a person without right.

(ii) Succession of Squatters: the notion that the Statute operates as a conveyance also fails to be comprehensive because it cannot be sensibly applied where a succession of squatters have held the land.

> "If twenty persons unconnected with each other had been in possession, each for one year, consequently for twenty years.... it would be impossible to say to which of the twenty persons the 34th Section (now 1980 Act, s.17) has transferred the title". [33]

(e) **Balance of opinion**

In the above paragraphs, an attempt has been made to show the difficulties which are inherent in the "Parliamentary Conveyance" doctrine. Consideration of this topic was begun with a summary of the legal authorities in favour of the doctrine. It is only fair to end it with a summary of the authorities which, for some of the reasons mentioned above, opposed and ultimately, overwhelmed the doctrine.

The idea that the Statute effected some sort of transfer was of course first formulated after the passing of the R.P.L.A. 1833 to explain the operation of that legislation. From the very first, however, it was criticised by textbook writers. Hayes[34] warned firmly against confounding the negative effect of the Statute with the positive effect of a conveyance:

> "The Statute does not convey but destroys the right".

Other eminent contemporary writers took the same view.[35]

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33. Patterson J., **Doe v. Barnard** (1849) 13 Q.B. 945, 952.
34. Conv. 5th ed., 1840, 269.
35. See e.g. Dart, V & P, 6th, Vol.1, 463.

An undercurrent of English authority which, in effect, also opposed the doctrine also developed during the course of the 19th century.[36] However, it was not until the end of that century that the doctrine was laid to rest (at least in England and Wales)[37] by the decision in **Tichborne v. Weir.**[38] In that case, the Court of Appeal[39] held in clear terms that the Statute did not effect a transfer. In the pellucid summary of the Master of the Rolls:[40]

> ..."The matter comes to this. That the words of the Statute do not carry the proposition contended for, the reason of the thing being against it; there is an absence of judicial authority, and the views of well-known text-book writers are uniformly against it. All these reasons show that the effect of the Statute is not that the right of one person is conveyed to another, but that the right is extinguished and destroyed".

In the light of the lack of conformity of the notion of the "Parliamentary Conveyance" with the objectives of the Statute of Limitations, the demise of the doctrine is not a matter of regret.

(B) The "Commensurate Estate" theory

This is the second of the three theories which have been advanced to explain the nature of the title acquired by an adverse possessor. Its origins are to be found[41] in the following statement in the first edition (1867) of Darby and Bosanquet's **Statutes of Limitations:**[42]

> ..."the title gained by...(adverse) possession being limited by rights yet remaining unextinguished, is clearly commensurate with the interest which the rightful owners have lost by the operation of the Statute, and must therefore, it is apprehended, have the same legal character, and be freehold, leasehold or copyhold accordingly".

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36. **Doe v. Barnard** (1849) 13 Q.B. 945; **Davison v. Gent** (1857) 1 H.& N. 744; **Ex parte Winder** (1877) 6 Ch.D.696; **Rosenberg v. Cook** (1881) 8 Q.B.D. 162; **Williams v. Allen** (1889) 5 T.L.R. 200; **Wilkes v. Greenway** (1890) 6 T.L.R. 449.
37. It may have survived a little longer in Ireland: **Mulcaire v. Lane-Joynt** cited above (where the Court was divided). But it was finally condemned by the Supreme Court in **Perry v. Woodfarm Homes Ltd.** [1975] I.R. 104.
38. (1893) 62 L.T. 735, approved by the House of Lords in **Fairweather v. St. Marylebone** [1963] A.C. 510, 535, 544, 553.
39. Lord Esher M.R., Kay and Bowen L.JJ.
40. (1893) 62 L.T. 735, 736.
41. See **Fairweather v. St. Marylebone**, cited above, at p.544 (Lord Denning).
42. Page 390, reproduced, with insignificant alterations in the 2nd ed., 1893, p.494, and in 2nd edition with supplement, 1899.

The statement is provokingly ambiguous.[43] What did the learned editors mean by it? Three possibilities have been suggested.

(1) Were they suggesting that the Statute effected some sort of transfer of the old estate to the adverse possessor? Or, alternatively

(2) Was their idea that the Statute did not transfer, but created a wholly new estate which was a mirror image of the former estate which the Statute had just extinguished; or

(3) Did they in fact accept that a squatter's title is (in general) a wholly independent estate in fee simple and were they merely using a dangerous metaphor to describe the incidents to which that estate was subject.

It will be seen that the first of the three possibilities is the same as the "Parliamentary Conveyance" heresy which has just been considered; the third possibility is one and the same as the "independent title" idea which will be considered next. Only the second possibility - "the mirror image" - represents a distinct theory.

(i) Did Darby and Bosanquet support the "Parliamentary Conveyance" heresy? The answer here is an unequivocal no. The editors made their own views clear on the point in the same chapter of the book. After referring to the transfer doctrine they state.[44]

> "the truer view is, that the operation of the statute in giving a title is merely negative; it extinguishes the right and title of the dispossessed owner, and leaves the occupant with a title gained by the fact of possession, and resting on the infirmity of the right of others to eject him".

The editors also expressly prefaced their remarks about a commensurate estate with the statement that "the title extinguished... is not directly transferred to the wrongdoer who has been in possession". In the light of these statements, it is impossible to believe that in saying a squatter acquires

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43. And misleading, per Lord Radcliffe in **Fairweather**, cited above, p.336.
44. 1st ed., p.390; 2nd ed., p.493.

a "commensurate estate", the editors really meant he received the former owner's estate by way of transfer[45]

(ii) Did Darby and Bosanquet intend to invent a new theory - the "Mirror image" estate?

This again seems most improbable. There is no authority before the date of Darby and Bosanquet's first edition (1867) which even remotely suggests that a squatter acquired, not the same estate, but an independent although identical version of it.

It is really too much to believe that Darby and Bosanquet would, in these circumstances, have asserted such a theory without any discussion or citation. There is of course nothing in the legislation which even remotely suggests the theory; and scarcely any authority, of any date, in favour of it.[46] The law is clearly otherwise in England and Wales[47] and the Irish Republic.[48]

However, one writer, J.A. Omatola[49] has suggested that adoption of the "commensurate estate" theory might provide a practical solution to the intractable problem (discussed in Chapter 13) of the operation of the Statute of Limitations on leasehold estates. This seems implausible. The policy merits (or lack of them) of the "commensurate estate" theory are precisely the same as those of the "Parliamentary Conveyance" doctrine. They must be, if the estate acquired by a squatter really is commensurate. If, therefore, the theory is that the former owner's title is extinguished, but that the squatter acquires a mirror image of it, then:

(a) The squatter would have imposed on him the same liabilities as those to which the former owner's estate was subject;[50]

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45. Although precisely this view has on occasion been attributed to them; see Johnson J., **Rankin v. McMurtry** (1889) 24 L.R. Ir. 290, 297; Lord Denning in **Fairweather** [1963] A.C.510, 544. Wylie (1965) 16 N.I.L.Q.467, 471 and Megarry and Wade, 4th ed., p.1029, n.20, seem to hint at the same view.
46. Save Holmes L.J., dissenting, in **O'Connor v. Foley** [1906] 1 I.R. 20.
47. **Fairweather** [1963] A.C.510.
48. **Perry v. Woodfarm Homes Ltd.,** [1975] I.R. 104.
49. (1973) 37 Conv. 85.
50. Cf. **Tichborne v. Weir**, cited above.

(b) Third parties may be prejudiced - e.g. the lessor would lose a potentially valuable covenant and gain a potentially valueless one; he may also lose the ability to take a surrender or effect a merger of the former lease;

(c) The former lessee may be unduly oppressed - e.g. if he remains liable to the lessor on covenants in a lease that he can no longer surrender.

Professor Omotola does not confront these difficulties in his article, nor does he suggest how they could be solved.

The present writer believes that the theory of a commensurate estate adds nothing to the doctrine of Parliamentary transfer and suffers from the additional disadvantages that it is more complex; it provides no solution whatsoever.

(iii) The only remaining possibility is that Darby and Bosanquet were speaking metaphorically and not literally. This seems the most likely explanation.[51] Probably what Darby and Bosanquet were suggesting was that a squatter acquires, by virtue of his possession, an independent title; but that the title was subject to any rights subject to which the former owner had held the land and which had not been extinguished by the Statute. Therefore, the adverse possessor's independent estate could be said to be "commensurate with" or in other words, could in practise be measured by the length of and the incumbrances on the former owner' estate.

If this was what Darby and Bosanquet meant, then the first part of their statement was simplistic and misleading.[52] The second part of the statement - "the title gained therefore must have ...the same legal character"

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51. **Walter v. Yalden** [1902] 2 K.B. 304, 309; **St. Marylebone v. Fairweather** [1961] 1 Q.B. 498, 524, (C.A.) Wilmer L.J.; [1963] A.C. 510, 530 (H.L.).
52. Note 43 above. And see Wade (1962) 78 L.Q.R. 541, 545.

- was simply erroneous and cannot be supported at all.[53] To summarise, whatever Darby and Bosanquet may originally have meant, the present law is clear. An adverse possessor cannot properly be said to acquire a commensurate estate. Nor does the theory have any independent attractions on grounds of policy. It requires no further attention.

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53. **A.C. v. Tomline** (1880) 15 Ch.D.150 - cited by D. and B. in their second edition without any attempt at explanation. Cf. **Rankin v. McMurtry** (1889) 24 L.R. Ir. 290 where the Irish Q.B. Div. Court found support for D. and B. in the English decision in **Re Williams** (1886) 34 Ch.D.558 - "**Re Williams** supports this (D. and B's) conclusion, as the estate there acquired (by the squatter) was treated as a chattel" (p.304). These remarks are based on a misunderstanding of **Re Williams**, where a lease was treated (quite rightly) as a chattel, but only in the hands of **next of kin**, not in the hands **of the squatter.**

(C) The Independent Title

The third, final and prevailing theory of the nature of the title acquired by an adverse possessor is that of the independent title:

> "A squatter's title arises quite independently of any previous title and is based on his own possession simply".[54]

The better current opinion is that adverse possession gives a title to the land possessed.[55] This can be demonstrated by considering the squatter's rights. Having obtained possession, the squatter can resist or bring proceedings against trespassers; he can recover the premises if ejected by another squatter; he can sell them or dispose of them by will - if he does not, the premises will pass on his intestacy.[56] A squatter, then, on taking possession obtains a title to the land. And that title is not one transferred by or derived from the owner:

> "He is not at any stage of his possession a successor to the title of the man he has dispossed. He comes in and remains in always by right of possession, which in due course becomes incapable of disturbance as time exhausts the one or more periods allowed by the Statute for successful intervention".[57]

The Statute, therefore, does not confer a title. It merely protects a title acquired by virtue of possession.

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54. H.W.R. Wade, (1962) 78 L.Q.R. 541, 543.
55. Note 31, above.
56. Without necessarily also becoming seised. Although the better opinion is that expressed in the text, and although there is today no means of vindicating seisin as distinct from possession, it is nevertheless still possible to maintain that title depends on seisin rather than on mere possession (Hargreaves (1940) L.Q.R. 376, 391, 397). However, Megarry and Wade point out "any distinction between seisin or possession as the basis of title is obscured by the well established rule that possession of land, if exclusive of other claimants and not otherwise explained, is evidence of seisin in fee simple".
    Nevertheless, difficult cases might arise (see Hargreaves' article, p. 395, n.98) where time runs in favour of someone who is possessed but not seised, i.e. where time runs in favour of a tenant. If seisin is still the basis of title, it may be possible to explain such cases by saying that, once the Statute has extinguished the former lessor's estate, the possessor necessarily becomes seised in fee: Lightwood, Possession, 274.
57. **Fairweather** [1963] A.C. 510, 535, per Lord Radcliffe.

Such being the modern theory, it is necessary to turn to an examination of its merits and the extent to which it promotes the general objectives of the Statute of Limitations.

(1) Independent Title - the merits

(a) Coherence

The first advantage of this theory is that it provides a rational and comprehensive explanation for the way in which the Statute operates and a title is acquired. This theory, unlike the "Parliamentary Conveyance" notion, explains how and why a squatter can resist third parties and deal with the land before time has run. It is also in harmony with the Statute, which is drafted in the negative - that is to say, the Statute states what happens to the old title, but is silent on the nature of the title acquired by a squatter. The theory of an independent title neatly fills the gap.

However, although the theory of an independent title does provide a coherent general explanation of the nature of the title acquired by a squatter, a word of qualification is necessary. Where time runs (as it may) in favour of someone in lawful possession of the land, then no independent title may exist before the Statute has operated to bar a prior claimant. Thus, where time runs in favour of a lessee, mortgagee or a beneficiary entitled in equity, no independent title would seem to arise until the Statute has operated to extinguish the titles of the lessor, mortgagor or trustee as the case may be. But once the title of a lessor has been extinguished, it is no longer possible to regard the possessor as a lessee, so that thereafter the existence of an independent title in the former lessee must be recognised.[58] It should also be pointed out here that the theory of independent title does not necessarily imply that the person in actual occupation is acquiring a title in fee

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58. Cf. **Jessamine v. Schwartz** [1976] 3 All E.R. 522, C.A.

simple himself. He may be acquiring a title for a third party if e.g. he is a tenant encroaching on neighbouring land. (Chapter 8)

Where time runs in favour of a mortgagor against a mortgagee, the theory of an independent title is inapplicable.

(b) Liabilities not transferred

The second and the most important advantage of the theory of independent title - as compared with the notion of the Parliamentary transfer - is that not all the liabilities subject to which a time-barred tenant held the property are necessarily transferred to an adverse possessor acquiring a title by possession and taking advantage of the Statute. In the leading case of **Tichborne v. Weir** (discussed above) it was held by the Court of Appeal that where the title of a lessee is barred by adverse possession during the currency of a lease, the lease cannot be treated as assigned to the adverse possessor so as to make the latter liable on the positive covenants in the lease.

In **Tichborne v. Weir,**[59] the covenant in question was a promise to repair. The result of that case demonstrated the benefit of the independent title theory - if an adverse possessor were to be subject to positive covenants in a lease, acquiring a title by possession and the operation of the Statute would be fraught with the greatest danger. This would be a major defect in legislation which can operate - as the English Act may - without knowledge or desire on the part of the person in whose favour it works. 'If the legislation did operate to transfer positive obligations in leases, it would therefore be quite incapable of achieving its objective of simplifying conveyancing. So far from shortening and making cheaper and quicker the process of investi-

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59. (1893) 62 L.T. 735.

gation of title, if the present rule were otherwise, it would probably have the opposite effect. A purchaser investigating title to unregistered land would then not feel safe in relying on proof of title from a good root only 15 years old, for fear that there might be, concealed behind that root of title, positive obligations to an unbarred lessor which might quite easily be greater than the value of the land itself.

However, the rule that an adverse possessor acquires his own independent title (free from positive covenants in any time-barred lease), does not necessarily imply that he takes free from **all** the rights or liabilities subject to which the former owner held the land. It is clear that he does not. It seems that, on the one hand, on the extinguishment of a title, any incidents of it are also extinguished. Thus in **Sykes v. Williams**[60] it was held that if a rent charge is barred, a right of re-entry taken by the owner to protect the charge will also be extinguished. Similar, if a lessor is barred by a lessee and the lessor's title is extinguished, the lessor cannot sue for arrears of rent accrued due before his title was extinguished.[61] The right to the arears is extinguished with the title.

On the other hand, however, extinguishment of a title will not affect rights which are regarded not as being incident to but rather as being paramount to the estate barred. Into this category fall easements,[62] restrictive covenants[63] and, no doubt, any other unbarred equitable interests in the land.

The dangers posed by the possibility that person acquiring a title by possession and the operation of the Statute might find himself subject to

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60. **Sykes v. Williams** [1933] 1 Ch.285. Although after **Fairweather**, presumably incidents are only to be regarded as extinguished to the same extent as the title, that is, only relatively.
61. In **re Jolly** [1900] 2 Ch.616; cf. **Re Landi** [1939] 828, 833.
62. **Fairweather v. St. Marylebone** [1963] A.C. 510, per Lord Radcliffe.
63. **Re Nisbett and Pott's Contract** [1906] 1 Ch.386, C.A.

unbarred rights paramount to the title extinguished by the Statute requires careful evaluation. For this possibility might seem to prevent the Statute fulfilling its objective of quieting titles and simplifying conveyancing. Each type of "paramount right" must be considered in turn.[64]

Easements and profits

The danger here is that a purchaser of a legal estate who has investigated title from a good root of appropriate age might nevertheless find (a) that the title he acquired is possessory and that an identifiable earlier title was barred by the Statute but that nevertheless (b) that earlier title was subject to an easement or a profit which is enforceable and which he did not and could not have discovered. Is this a serious risk? To provide an answer, a number of points must be made.

(i) First, it should be borne in mind that this risk is not a special defect in the theory of "independent title". Whichever theory of the mode of operation of the Statute is adopted - "Parliamentary Transfer" or "Mirror Image" or "Independent Title" - an adverse possessor and anyone claiming through or under him will take subject to any easements enforceable against the time-barred title.

(ii) Second, the existence of an easement over servient land may be of little or no concern to a purchaser of the land. Easements do not (with the exception of the rare easement of fencing) require expenditure by the servient owner. They commonly impose only a limited burden on the servient land, although it is of course true that an easement may sometimes impose a substantial burden[65] and may effectively prevent development or change

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64. The question whether the interests of a beneficiary under a trust are dependent on or are paramount to the estate of the trustee was discussed in Chapter 10, above.
65. **A.G. of Southern Nigeria v. John Holt** [1915] A.C. 599.

in use of the servient land.

(iii) Third, the risk of an outstanding, undiscoverable easement is one which is shared by all purchasers whether they acquire an estate which depends on the Statute or whether the estate purchased, is in fact wholly good and does not depend on the Statute at all for its defence. All purchasers take subject to this risk. The Statute of Limitations does not of course, in general,[66] provide a time bar against the enforcement of incorporeal hereditaments. The question whether the Statute should make all incorporeal herodita-ments subject to a period of limitation is not an easy one and is (in general) outside the scope of this thesis.[67] However, it may not be out of place to point out here that, if it were desired to fix such a limitation period, one of the problems would be to identify a suitable point from which time might commence to run. In principle, such a point would need to be one on which the owner of the dominant land was aware that he must act to protect his right. The taking of adverse possession over the servient tenement would not be a suitable **terminus a quo** from the position of the dominant owner. The latter is unlikely to be aware of the legal merits of claims to possession of the servient tenement and is unlikely, therefore, to know whether any particular possession is in fact adverse.

Probably, it would also be unfair to make time run against a person entitled to an easement from the date the right was last exercised - i.e. time would run during periods of non user. Easements are frequently discon-[68] tinuous in their use and there are, very often, good reasons to explain non-user over long periods of years. For the present, however, all purchasers (whether or not they rely on the Statute to protect their possession) hold

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66. The exceptions are tithes and rent charges.
67. Chapter 1, above.
68. E.g. a right way: **Williams v. Usherwood** [1983] P.&C.R.235.

subject to the possibility that an old claim to an easement might be made out. Nevertheless, some gauge of the extent of that risk can be obtained bearing in mind the following points

(iv) An asserted right might be difficult to establish. If a "right" has not in fact been exercised for many years, it may be difficult or impossible to establish that the right exists. This is certainly the case where the dominant owner relies on the Prescription Act 1832, since that Act requires periods of enjoyment to be "next before action brought".[69]

(v) If a right does exist over land, it will probably be known to the owner/ vendor of that land and consequently, would be disclosed to any purchaser.

If the right was created by grant, it would normally (although not inevitably) be apparent on examination of title deeds.[70] If, on the other hand, the right was acquired by prescription then since the user will have to have been "nec clam", the user would have been known to (or at least, discoverable by) the servient owner.[71]

Now if an easement exist and has been exercised to the knowledge of a vendor, it would in practice normally be disclosed to a purchaser in contractual particulars of sale,[72] since otherwise it would be implied that the land was sold free from incumbrances.[73]

(vi) The existence of an easement may, in any event, be discoverable by a purchaser on an inspection of the property,[74] e.g. wires, pipes or paths may be visible on the property; windows in adjoining buildings may overlook the property.

(vii) If an easement does exist over land, but is not known to the vendor of that land, then this may be because the right has not been exercised.

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69. **Parker v. Mitchell** (1840) 11 A & E. 788.
70. **Dalton v. Angus** (1881) 6 App. Cas. 740.
71. **Gardner v. Hodgson's Kingston Brewery** [1903] A.C. 229.
72. Farrand, Contract and Conveyance, 3rd., p.50.
73. Re **Ossemsky Estates Ltd.** [1937] 3 All E.R. 744.
74. **Yandle v. Sutton** [1922] Ch.199.

If it has not been exercised, it may have been abandoned and so extinguished.[75]

To summarise, if an easement does exist and is enforceable, it will probably be known to any vendor and so disclosed. The rules referred to above, however, do not provide a perfect scheme of protection as it is perfectly possible for an easement to exist and be enforceable without it being known to either a vendor or purchaser.[76] Nevertheless such theoretical risk as there is, affects all types of purchaser; it is not confined to purchasers who (whether they know it or not) are acquiring a title which relies for its protection on the Statute of Limitations. The risk cannot therefore be accounted a peculiar defect of the Statute. However, it ought to be added that the risk posed by an outstanding easement is probably slightly worse (at least in theory) in the case of titles which do in fact rely on the Statute. First, if adverse possession has been taken of land by a complete stranger to it, then the paper title to the land which might subsequently come into existence will necessarily be confined to the period after the commencement of adverse possession. It will not, therefore, necessarily reveal anything about any earlier, time-barred, paper title from inspection of which easements might have been discovered. But this is a very slight and theoretical risk since the easement, if useful, will probably have been asserted and enjoyed and so been known to the occupants.

Second, and a little more serious, the acquisition of a title by adverse possession must logically break the chain of covenants for title,[77] thus preventing an innocent purchaser affected by an undiscovered easement from bringing an action for damages against any vendor who conveyed **before** the start of adverse possession or against any vendor conveying after that date in respect of any easement created under the old title.

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75. Although abandonment may be presumed from non-user, mere non-user will not suffice if there is some explanation for it; **Swan v. Sinclair** [1924] 1 Ch. 254; **Tehidy v. Norman** [1971] 2 Q.B. 528, 553, **Williams v. Usherwood**, cited above.
76. See, e.g. Law Reform Committee, 14th Report, p.12, pointing out that even user as of right may be insidious.
77. **Ash v. Hogan** [1920] 1 I.R. 159, 169; Farrand, cited above, p.255.

Public and customary rights

Public and customary rights no doubt also continue to subsist despite the acquisition of a new title to the land by possession and the extinguishment of a former title by operation of the Statute. These rights also give rise to problems for purchasers which are similar to those relating to easements and profits which were discussed in the previous section.

Here again, however, all purchasers, whether acquiring land to which an unblemished title can be shown or one which (whether the purchaser knows of it or not) in fact relies for its protection on the Statute, take subject to the same risk. It is true, of course, that if a public or customary right exists over land offered for sale then it may be discoverable on inspection of the property and, if it is known to the vendor (as is likely) it will be disclosed before contract. However, these possibilities do not provide perfect protection. As the notorious case of **Wyld v. Silver**[78] demonstrates customary rights, once established (it may of course be difficult to prove an alleged custom) may subsist and be enforceable even though unknown to and undiscoverable by an innocent purchaser.

In **Wyld v. Silver**, an inclosure award made pursuant to a private Act, allotted parcels of land subject to the right of the inhabitants of the place to hold an annual fair or wake thereon once a year. No such fair or wake had been held in living memory.[79] A purchaser/developer acquired the site having investigated title from a root approximately 58 years old which did not disclose the existence of the right. Memory of the right had not, however, perished in the locality and on the application of representative inhabitants, it was held that the purchaser took subject to the right.[80]

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78. [1963] Ch.243.
79. A long period of non-user may raise a presumption that no custom ever existed; **Hammerton v. Honey** 24 W.R. 603.
80. And did not even have a remedy against this vendor on the usual implied covenants for title, per Russell L.J. at p.268.

Quite clearly, therefore, there is some risk that even a prudent purchaser may find himself subject to an unknown customary right.

Similar problems arise in relation to public rights:

> "A public right of way may for years not have been used; its existence may have been forgotton; all trace of physical indications on the land may have been obliterated..."[81]

Nevertheless, any purchaser will take subject to such rights, which may be so extensive as to frustrate the purpose for which the land was acquired.[82]

The position in such cases is highly unsatisfactory for purchasers since neither public nor, apparently, customary rights can be abandoned and are not extinguished by non-user.[83]

However, here again it cannot be accounted a peculiar defect of the "independent title" theory that the fact that a purchaser who takes ((knowingly or otherwise) under a possessory title protected by the Statute, also takes subject to public or customary rights. All purchasers, whether the Statute is involved or not, take subject to such rights. Once again, it is a difficult question whether some limitation period or statutory bar ought to exist against public or customary rights.

That question, however, and its problems are outside the scope of this thesis.[84]

Other paramount incumbrances

Other rights which can be regarded as paramount to a time-barred estate include leasehold reversions, mortgages and equitable incumbrances. These

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81. **A.G. v. Shonleigh Nominees** [1974] 1 W.L.R. 305, 312, (Lord Morris).
82. Ibid, p.314 (Lord Morris), p.323 (Lord Salmon).
83. **Dawes v. Hawkins** (1860) 8 C.B. (N.S.) 858 - "once a highway, always a highway"; **Wyld v. Silver**, cited above; **Suffolk C.C. v. Mason** [1974] A.C. 705, 710; **New Windsor Corp. v. Mellor** [1974] 1 W.L.R. 1504, 1508. A release under seal might, it seems, be implied in the case of an unexercised right vested in a corporation, **Great Eastern Railway v. Goldsmid** (1884) 9 App. Cas. 927 (H.L.).
84. Chapter 1, above.

topics, however, were dealt with at an earlier stage in this thesis.[85] Only the topics of tithes and rentcharges remain to be considered.

Rentcharges: rentcharges are, like leases, mortgages and some equitable interests, specifically made subject to the Statute so that a rentcharge enforeable against land will normally be barred at the same moment that title to that land is extinguished. However, time will not run against a rentcharge owner while he is receiving rent from any person liable to pay it, even though the latter is not in possession. Consequently, it is possible that time might run against an estate owner without an owner of a rentcharge over the land also being barred. There is, therefore, a (slight) theoretical risk that a purchaser investigating title from a good root at least 15 years old might find a rentcharge concealed behind an apparently sound paper title and unknown to both vendor and purchaser.

The risk seems very small.

Tithes: tithes and related rights are subject to appropriately obscure treatment in the Statute of Limitations. Tithes appear in questions (if there ever are any) as between rival claimants, to be subject to the Statute, whilst the effect of lapse of time as between tithe-payers (if any) and tithe-owners are governed by the Tithe (Prescription) Act 1832. Tithe redemption annuities are not subject to the Statute (1980 Act, section 37 (1)), but were in any case extinguished as from 3.10.77. The position of corn rents and corn rent annuities is unclear. The latter, at least, would seem to fall within the Statute as rentcharges. An unusual but occasionally troublesome right not apparently caught by the Statute is liability for chancel repairs. However, the Law Commission have recently announced proposals to investigate a progressive phasing out of this liability, in the few cases in which it exists.[86]

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85. Chapter 8, Leases; Chapter 9, Mortgages; Chapter 10, Trusts.
86. Law Commission, 17th Annual Report, para.2.1.

Paramount rights - summary

In some circumstances, rights which can be regarded not as being incidents of but rather as being paramount to a time-barred estate, may persist and be enforceable against an innocent purchaser of an estate in that property. This cannot, however, be regarded as a special defect in the theory of "independent title". It is a risk shared by both the competing explanations of the mode of operation of the Statute. Indeed, the risk is one shared by all purchasers of land, whether or not the Statute has played a part in shaping the devolution of the particular title. The question whether all such rights should be brought within the statutory bar is a difficult one and is outside the scope of this thesis. Such risks as there are at present do not seem to interfere seriously with the ability of the Statute to achieve the objective of simplifying conveyancing.

(2) Independent title theory - disadvantages

If the single most important advantage of the "independent title" theory is that it prevents the automatic transmission of some types of liability to the party in possession, then the single most important defect must be that, by the same token, the theory also prevents automatic transmission with the land of beneficial ancillary rights enjoyed over neighbouring properties. In other words, since the Act does not operate by way of "Parliamentary conveyance", it prevents assignment of some burdens or liabilities; but it also prevents transmission of some benefits. Further, since the title of a squatter is not transferred to him by the former owner but arises indedently, the squatter cannot enjoy any right, such as a way of necessity, which assumes a grant by the former owner; **Wilkes v. Greenway.**[87]

In **Wilkes v. Greenway**, the parties agreed that the defendant had acquired a title to two land-locked gardens of which the plaintiff had been owner. The plaintiff still owned a private road which was the only means of approach to the gardens, and this had been used by the defendant. The plaintiff claimed an injunction to prevent this user, contending that, although the defendant had acquired a title to the land, he had not acquired a right of way over the road since the 20 years user required by the Prescription Act 1832 was not present. In the Court of Appeal, it was held that no way of necessity existed. The doctrine of necessity was said to be confined to a title by grant. Since the Statute did not operate by way of transfer or grant, no easement of necessity could be implied.

To what extent does this rule (no necessary transmission of benefits) affect the ability of the Statute to achieve the objectives of

(i) simplifying investigation of all titles and

(ii) quieting defective titles?

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87. **Wilkes v. Greenway** (1890) 34 Sol. Jo. 673; 6 T.L.R. 449. That a way of necessity assumes a grant, was reaffirmed in **Nickerson v. Barraclough** (1981) 3 All E.R. 369; cf. **Williams v. Usherwood** [983] 45 P. & C.R. 235.

(i) Conveyancing implications

Now in this thesis, it has been suggested that one of the main objectives of the Statute is to simplify and expedite conveyancing by (indirectly) shortening the period for which it is necessary to investigate an unregistered title. The Statute achieves this objective by providing a qualified guarantee that an old claim to the land in question which may have existed and which may be concealed behind a root of title to the property, is no longer enforceable.

Does the theory that squatter acquires an independent title and the consequent rule in **Wilkes v. Greenway**[88] interfere with this aim of the Statute? The answer would seem to be that it does not do so to any significant extent. Three situations must be distinguished:

(a) Title known to be possessory

It has been pointed out in this thesis that one objective of the Statute is to quiet titles - that is, to render titles marketable by clearing off possible defects. The theory that an adverse possessor acquires an independent title is a little inconsistent with the notion that the Statute can operate so as to remove defects, patent or latent, on a single title. However, so far as the non-transmission of easements is concerned, there is little danger (at least in theory) that a purchaser might fail to acquire a necessary easement when the title is known to depend on the Statute. Where a possessory title is offered - or a defect is discovered which a vendor relies on the Statute to cure - the possessory nature of the title ought, in theory, to be sufficient warning to a purchaser to look to the easements and make sure he can obtain the ancillary rights which requires.[89]

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88. Cited above.
89. A purchaser agreeing to take a possessory title ought in any event to insist on proof of title for more than the minimum 12 years; Farrand, 3rd ed., 105, for the reason there stated. An additional reason would be to ensure that a prescriptive right to any necessary easement can be established.

This, however, is theory. In life, practitioners may not necessarily appreciate the need to 'look to the easements' whenever the Statute is relied on. Indeed, the Courts themselves do not seem to have paid much attention to the point in purporting to lay down - as a positive rule - that a possessory title can always be forced on a purchaser under an open contract,[90] provided that the vendor can prove that the Statute has barred all the prior interests - that is, by proving both the interests which existed in the land at the moment that time commenced to run and then proving that the Statute has barred all such interests. In none of the decided cases do the Courts seem to have considered the question whether title need be shown so as to demonstrate the enforceability of any necessary easements.[91]

In the case of a title known to be possessory, there is, therefore, not necessarily a defect in the legislation, but certainly a trap for the unwary.

(b) Easement created during span of an apparently regular paper title

The second situation which must be distinguished, is the case where an easement appears, on investigation, to be held for the benefit of an estate to which there is an apparently regular paper title, it having been created during the period spanned by that title. In this case, the easement will be as good as the title of its creator. If the grantor's title is good - even though in origin it was possessory and relies on the Statute for its protection

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90. Indeed, this principle has been extended from open contracts to those containing a special condition stating the instrument with which the title is to commence: Ferrand, p.105. This is illogical. If the vendor has contracted to sell the title deduced from the good root, it is difficult to see how he fulfils that contract by proving quite different, independent title adverse to that contract for. See **Ashe v. Hogan** (1920) 1 I.R. 159.

91. See **Games v. Bonner** (1884) 54 L.J. Ch.517; **Re Atkinson v. Horsell's Contract** [1912] 2 Ch. 1.
It is possible that there were no such easements in any of the decided cases. And in the earliest of the cases in which a possessory title was forced on a purchaser, the point did not arise, since the Statute was there held to operate as a Parliamentary Conveyance, (a view no longer tenable); **Scott v. Nixon** (1843) 3 Dru. & War. 388; **Tuthill v. Rogers** (1844) 1 Jo. & Lat. 36.

- then the easement will be equally good.

In this case again, therefore, the rule that an adverse possessor acquires an independent title and that the Statute neither transfers nor creates easements, does not in practice interfere with the achievement by the Statute of its objective of shortening and so simplifying investigation of paper titles.

(c) Easement created before commencement of apparently regular paper title

If on the other hand, an easement was created not during but before the commencement of an apparantly regular paper title on which it is trans mitted, then it is (just) conceivable that the Statute might have operated to protect the title itself, but has not transmitted an easement which purports to pass with that title.

For example, imagine that a testator devised property to a descendant falling within a description. Under a mistake as to the effect of the gift, one of his descendants takes possession of deeds and land to the exclusion of the true owner against whom time runs.

In such a case, the correct analysis seems to be that the true owner's title (once time has run) is extinguished as against the person in possession and that that person does not acquire easements enjoyed by the former owner. Nevertheless, if the possessor believes himself to be lawfully entitled and has possession of the former paper title, it is of course likely that if and when he comes to deal with the estate, he will attempt to transmit with it the benefit of an easement to which he is not entitled. It appears, therefore, that in some cases at least, an easement might purport to pass with an estate protected by the Statute, and yet be open to challenge.

However, the practical answer to this problem of an undiscovered defect hidden behind a root of title may be that a purchaser must rely on the fact that title to the property including the right to the easement, was very probably investigated at the time when the transaction now forming the

root of title took place. A defect, if there was one, ought then to have been discovered. If it was not, and the easement is not in fact enjoyable under the paper title, then the purchaser may nevertheless have the consolation that the easement may now have been exercised long enough to support a claim to acquisition by prescription.

This is not of course complete consolation, since the rules for acquisition of an easement by prescription do not necessarily coincide with the rules for acquisition of title by adverse possession. Thus, for example, notwithstanding that the Statute of Limitations may have extinguished the title of a former owner so that a squatter in possession can no longer be removed, a servient owner may nevertheless for some years still be in a position to interfere to prevent the acquisition by the squatter of a prescriptive right. The reason in this instance is of course that the statutory limitation period (minimum 12 years) is shorter than the period required by the Prescription Act 1832 (20 years). However, is it likely that a servient owner would intervene in such a case? To be tempted to do so, he will first need to be aware that the dominant tenement has been adversely possessed. This is unlikely, except in cases such as **Wilkes v. Greenway** (above) where the "servient owner" was also originally entitled to the "dominant" tenement. The result is that if adverse possession is taken of a dominant tenement, enjoyment by the adverse possessor of previously existing rights such as easements over adjacent land is unlikely to be resisted. If it is not resisted within the appropriate period, then the user may acquire, not a transfer of the old right, but a new right to do the same thing.[92]

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92. A mistaken belief by the claimant of a right to exercise an easement does not prevent the acquisition of the right by prescription: **De la Warr v. Miles** (1881) 17 Ch.D.335.

It must be conceded that the position is to some extent unsatisfactory in that if the servient owner does intervene before an adverse possessor has acquired a new easement but after the former title has been extinguished, then (fortuitously) the servient owner will find himself free of the incumbrance. The old title has gone and any ancillary rights, including easements, held in conjunction with that estate, must perish with it.

(ii) Quieting defective titles

The theory that a person who relies on the Statute has a title which is completely independent of that of the party against whom the Statute operates, is also inconsistent with the notion that the Statute is able to clear known defects from a single title.

Three special cases need to be mentioned.

(a) Leases. Where time runs in favour of a lessee (see Chapter 8) it would seem that the effect of the Statute in extinguishing the lessor's estate, necessarily extinguishes the lessee's rights under the lease as they existed at the moment before the limitation period expired. Thereafter, the former lessee is in possession under an independent title.

Although not raised in any decided case, it is possible that such a former lessee has this problem. If the old lease is gone, any ancillary rights included in the lease (e.g. easements) must have disappeared with it.[93] But if e.g. the original easements are gone, and the former lessee has only just acquired an independent title, then no new easements can yet have arisen by prescription. In a case in which such easements were vital to the enjoyment of the land, the former lessee might find that, by the effect of the Statute, he has effectively lost the value of the land. Possibly, however, this problem might be solved if either the Court was prepared to presume a lost grant,[94]

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93. Although, presumably, only relatively; **Fairweather v. St. Marylebone**, [1963] A.C. 510.
94. 14th Report, para. 41, but this would not solve all problems e.g. where the servient tenement at relevant times was not occupied by a freeholder.

which seems unlikely, or alternatively, to regard a lessee's use of an easement granted in a lease as having retrospectively changed its quality and become - after the Statute has operated - user by independent right sufficient to support a claim by prescription. There is a little authority for giving the Statute a retrospective effect; in **re Jolly**,[95] for example, extinguishment of a title in effect also retrospectively extinguished an accrued right to arrears of rent. And the Court has in other cases appeared willing to adopt a construction which avoids the Statute forcing an unwelcome result on a former lessee in possession:

> "It would be unjust that the sub-tenant, having been saddled by operation of law with a possessory title, should be deprived against his will of what must in the circumstances be the more valuable right".[96]

The above suggestion, however, is at best, only a partial solution. It could only possibly work where the former tenant has been in possession for long enough and in circumstances sufficient to give rise to a prescriptive claim.

(b) Trusts. A second instance in which the Statute may operate otherwise than in favour of a possessor with an independent title, occurs when time runs against a trustee in favour of a beneficiary in equity.

In this case, however, it does not seem that the effect of the Statute in barring the trustee's estate can operate to the prejudice of the beneficiary in equity. It was pointed out in chapter 10, Trusts, (above), that equitable interests are not (in modern limitation theory) regarded as being dependent on the estate of the trustee. An equitable estate or interest is not necessarily extinguished with the trustee's legal estate. This being so, when time has run against a trustee entitled at law in favour of a beneficiary entitled

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95. [1900] 2 Ch. 616.
96. **Jessamine v. Schwartz** [1976] 3 All E.R. 521, 529, Sir John Pennycuick refusing to accept an alleged loss, by operation of the Statute, of Rent Act protection.

in equity, the correct analysis would seem to be that the Statute extinguishes the trustee's legal estate and that thereafter, at law, the beneficiary must be regarded at law as occupying under an independent title. In equity, however, the beneficiary's estate is unaffected and he continues to be entitled to the ancillary rights such as easements to which he has been entitled throughout.

(c) Mortgages. A third case in which the Statute may operate otherwise than in favour of a person in possession under an independent title, can be found when time runs against a mortgagor in favour of a mortgagee. Here again, however, the effect of the Statute in barring a mortgagor's estate cannot, it seems, operate to the prejudice of a mortgagee since (i) it appears that a mortgagee is still able to exercise his statutory powers of sale of the mortgaged estate, notwithstanding that the estate has been extinguished by the Statute[97] and (ii) whether or not the mortgagee continues to be able to sell as such, he can enlarge the mortgage term into a fee simple or vest the leasehold reversion in himself (in the case of leasehold mortgagees).[98]

In either case, probably, the former mortgagee acquires the fee or the leasehold reversion together with easements corresponding to those formerly held for the benefit of the mortgaged estate.

Summary: the theory of independent title and the consequent rule in **Wilkes v. Greenway** affect the ability of the Statute to quiet titles only in one case (leases) and the problem there seems to be of theoretical rather than practical importance.

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97. **Young v. Clearey** [1948] 1 All E.R. 197.
98. L.P.A. 1925 ss.55, 88 (3), 89 (3), 153.

Chapter 14 - General Summary

None of the three theories of the nature of a squatter's title provides a perfect solution. Each has advantages and disadvantages. On balance, it is suggested that the comparison in this chapter of the theory of independent title with its rival, the doctrine of the "parliamentary transfer" reveals that the advantages of the former are greater and its concomitant disadvantages are less. For the reasons given, the theory of independent title seems more consistent with policy objectives of the Statutes of Limitations than any other theory.

CHAPTER 15

REGISTERED LAND

I. Introduction

This chapter deals with the relationship between adverse possession and the law relating to registered land. Its main thrust is confined to two topics. The first, (Section II) deals with the reasons for allowing registered land to be subject to the law of adverse possession. The second, (Section III) deals with the modifications to which the general law of limitations is subject in its application to registered land.

II - Should adverse possession of registered land be permitted?

In this thesis, it has been suggested that one important general objective of the Statute of Limitations in its application to land is to provide certainty and to make the conveyancing of unregistered estates quicker and cheaper. There is undoubtedly a parallel between this aim and the general objectives of the land registration system. This connection is revealed by the preamble to the first Land Registration Act (1862) which stated that:

> "Whereas it is expedient to give certainty to the title to real estates and to facilitate the proof thereof and also to render the dealing with the land more simple and economical..."

Although the Act of 1862 is no longer the governing legislation, the current edition of the leading treatise on registered land confirms that today the objects of the registration system are still to simplify, cheapen and expedite the transfer of land.[1]

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1. Ruoff and Roper, 4th ed., p.8.

However, whilst there may be a parallel between the general objectives of the Statute of Limitations and the land registration legislation, it is also clear that each attempts to fulfil its objectives by very different means.

The scheme of the Statute of Limitations, it has been suggested in this thesis, is to provide certainty against identified or possible defects only after the passage of time. It simplifies, expedites and makes cheaper the transmission of estates by making the prolonged investigation of the history of an unregistered title unnecessary in practice. But it does not achieve its objectives without cost. In certain circumstances the Statute prefers to sacrifice the claims of a few individuals who, e.g., did not know and could not have discovered that time was running against them, to the general good which the community derives from (relatively) quick and cheap investigation of title. The land registration legislation, on the other hand, fulfils the same objectives by considerably more sophisticated means. Here, it is the register of title which gives certainty, by providing an up-to-date official record of ownership of the land.[2] The register also radically simplifies and expedites the transmission of estates by eliminating the need to examine the past history of the title on each successive transmission.[3] The security of the register is of course underpinned by the provision for indemnity if, in certain cases, anyone should suffer loss through any error or omission in it.[3]

In these circumstances, with the Statute of Limitations and the land registration legislation attempting to achieve the same general objectives,[4]

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2. Ruoff and Roper, cited above. The register is certain because the legislation specifies precisely the effect of registration; e.g., the registration of a person as first proprietor of a freehold estate with an absolute title vests in that person an estate in fee simple in possession in the land.
3. **Gibbs v. Messer** [1897] A.C.248; Ruoff and Roper, 4th ed., 8.
4. Cf. Ontario Law Reform Commission, Report on the Statute of Limitations, 1969, p.44, "The affirmations of a land titles system are an alternative and more efficient means of avoiding worry about the mistakes of the past and of avoiding making mistakes".

but by very different means, two connected questions naturally arise. First, is there any need for the law of adverse possession to apply - whether in favour or against - registered land, if the registration scheme already achieves the common objectives; here the question is, is the Statute of Limitations superfluous in application to registered land?

Second, does the existence of the Statute pose any threat to the registered titles system; in particular, is the possibility that a registered proprietor might be deprived of his property by adverse possession, inconsistent with the aim of the registered titles system, which is to achieve certainty or security of registered titles? For purposes of exposition and analysis, the following situations may be distinguished:

(a) Where time runs in favour of a registered estate; and conversely,

(b) Where time runs against a registered estate.[5]

(A) Utility of a time-bar operating in favour of a registered estate

It has been suggested in this thesis that the Statute of Limitations facilitates unregistered conveyancing by providing a qualified guarantee that any adverse rights concealed behind an apparently sound root of title are likely to be unenforceable. It thus enables investigation of unregistered titles to be confined to a comparatively short period. Proof of a registered title, of course, proceeds on a wholly different basis. It may (and frequently does) consist[6] of nothing more complicated than provision of office copies and an inspection of the register. The official search of the register ensures

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5. Except in the rare case of double registration, where time runs against a registered estate it will always be running (until the adverse possessor has achieved substantive registration) in favour of an unregistered title. Of course, in some cases - boundary or encroachment cases - the adverse possessor in favour of whom is running may himself be the proprietor of adjoining land into which the adversely possessed plot has already been thrown. In such cases, rectification by way of addition to the adverse possessor's own title may be the most convenient course; **Williams v. Usherwood** [1983] 45 P.& C.R.235.
6. In the case of freehold registered with absolute title.

that no other entries have been made on it since the date of the office copies.

In the common case of absolute title, therefore, registration eliminates the need to investigate the past history of that title on each transmission.[7] Consequently, the Statute of Limitations seems to have no obvious role to play[8] in the transmission of estates registered with absolute title.

However, the Statute is in fact relevant to registered land practice in some circumstances:

(i) Compulsory first registration of title

The Statute is, first, relevant to a purchaser acquiring an unregistered estate in land in circumstances in which first registration of the title to that estate is compulsory. Like any other purchaser investigating title to an unregistered estate, the purchaser in this case will rely (consciously or not) on the Statute to buttress the title acquired against hidden defects. H.M. Land Registry will then rely on the Statute for the same purpose.

(ii) Absolute titles

Once the proprietor of an estate has been registered with absolute title, the Statute may thereafter be relevant in limited circumstances. All registered proprietors hold subject to the possibility (often of course, only the bare possibility) of their register being rectified against them. The Statute can bar claims to rectification and so, to this extent, be of interest to even a proprietor registered with absolute title. The Statute is of interest to the Chief Land Registrar too, since a barred claim to rectification cannot give rise to a claim for payment of indemnity on rectification.[9]

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7. Indeed, a purchaser in such a case is unable to investigate the prior history: L.R.A. 1925, s.110.
8. Subject to what is said below about boundaries.
9. L.R.A. 1925 s.83 (2).

(iii) Possessory titles

The Statute is clearly directly relevant in those cases where land is registered with a possessory title. Here the Statute may continue to improve the quality of a registered title and so justify upgrading that title to absolute or good leasehold.

The Land Transfer Commission (1870) have been credited[10] with originating the idea of a registered possessory title which could mature with the passage of time into an indefeasible or absolute title. The Commission formulated their idea in this way:

> "Lapse of time will confer a title increasing in validity till it becomes marketable in the technical sense, and practically indefeasible. It is as if a filter was placed across a muddy stream; the water above remains muddy but below it is clear and when you get so far down the stream as never to have occasion to ascend above the filter, it is the same thing as though the stream were clear from its source".[11]

The period fixed by the 1925 L.R.A. for compulsory upgrading of a freehold possessory title to absolute is 15 years; for upgrading a leasehold possessory title to good leasehold, 10 years. Although there is no direct correspondence between the general limitation period (12 years) and either of the other periods mentioned, nevertheless there can be little doubt that it is the Statute which, in practice, renders upgrading after passage of time a safe exercise.

In this instance, therefore, the Statute is able to assist in registered land cases by fulfilling one of its characteristic functions of clearing off stale claims and old stains on a title and so making it possible for the land to be brought fully back into commerce.

(iv) Good Leasehold

Similarly, the Statute is also directly relevant to leases registered with only good leasehold title, and not with absolute title. As is well known,

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10. Ruoff and Roper, 253.
11. Land Transfer Commission, Report, (1870), p.28.

the effect of such registration is that the lease itself and subsequent dealings are guaranteed; but the right of the lessor to grant the lease is not guaranteed, almost invariably because the lessor's title was not scrutinised at the moment when the lease was registered. The Statute of Limitations may therefore be relevant here in that, with passage of time, the possibility that the lessor may not himself have been entitled to the property will become more and more remote.

(B) Running of time against a registered estate; utility of time bar

This section deals with the most difficult problem considered in this part of the chapter. The question here is to discover why time should be permitted to run against a registered estate. For at first sight, it appears that a title registration scheme fulfills the conveyancing objectives of the Statute of Limitations by other means, thus rendering the latter superfluous, and that the possibility that a title might be acquired by adverse possession might prejudice the indefeasibility or near-absolute certainty[12] aimed at by most registration schemes.

Indeed, it is for the latter reason that, in many common law jurisdictions, a title cannot be acquired by adverse possession to Torrens' title land. The two statutory systems are regarded as incompatible.[13] Thus, in Canada, it seems that only Alberta[14] permits a squatter to establish a right to a registered title.[15] In other Canadian jurisdictions, adverse possession of

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12. No title registration scheme achieves full indeasibility since all appear to recognise the possibility of rectification in case of fraud; the possibility of double registration also prevents complete indefeasibility of titles: Ruoff, Torrens System.
13. Cf. **Belize v. Quilter** [1897] A.C. 367.
14. (1968) 6 Alta. L.R. (J.S. Williams).
15. In Australia opinion is more equally divided; the Australian Capital Territory and the Northern Territory do not permit acquisition of title by adverse possession to registered land. In Tasmania, Victoria and Western Australia, it is generally permitted. In N.S.W., Queensland and South Australia, it is permitted only in limited circumstances. In New Zealand, it is also permitted only in limited circumstances. (1963) N.Z.L.J. 524; (1964) N.Z.L.J. 110, 119. See generally, D.J. Whalan, Aust. Torrens System.

registered land is not generally permitted after land has been brought within a title registration system. In British Columbia, for example, it has been said that

> "the register should reflect the state of the title...A system of land registration is defeated if title can change hands by adverse possession. Persons dealing with the land, such as prospective purchasers, are not able to rely on the register to inform themselves accurately of the state of the title".[16]

The crux of this objection, therefore, is that a purchaser cannot safely rely just on inspection of the register; he must also investigate the possession.

This objection has not prevailed in this country, and our own present rule[17] has been defended on the grounds that purchasers can be expected to inspect any land before purchase, and that an inspection will disclose any adverse possession.[18] The rule in England and Wales:

> "Throws on every proposing purchaser, in order to ensure that he will get that which he bargained for, the onus - which is simple to discharge - of inspecting the land to see that there is no unauthorised person in occupation of it.[19]

Now, clearly, it is and always has been a fundamedntal principle of the English system of registration that purchasers are expected to inspect the land themselves.[20] The list of overriding interests contained in L.R.A. 1925, s.70. and to which all registered proprietors are subject, continues to reflect this expectation. Rights acquired by adverse possession are merely

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16. British Columbia, Law Commission, Report on the Statute of Limitations, (1974), p.46-47.
17. Originally, by virtue of s.21 of the L.T.A.1875, it was impossible to acquire title to registered land by adverse possession. The L.T.A. 1897 relaxed this rule by a very little, and in an apparently contradictory fashion (best explained by Lightwood, Time Limits, p.133-138).
18. An intermediate position is adopted in some jurisdictions (e.g. Alberta, Tasmania, England and Wales before 1926) and the register is regarded as conclusive in favour of a purchaser, but acquisition of title by adverse possession is nevertheless permitted. In other words, the full limitation period must run against one proprietor or the slate will, in effect, be wiped clean by a transfer.
19. Ruoff, Torrens Systems, 58, emphasis supplied.
20. See e.g. Report of Royal Commission (1857) on Registration of Titles, and the Report of the Royal Commission, (1870), p.26.

one item on this list.[21]

It is also true to say that adverse possession can often be discovered by inspection. However, a short caveat must be lodged here against the assumption that adverse possession can invariably be detected just by looking. As was pointed out in Chapter 7, above, adverse possession is not always unmistakeable or readily ascertainable either to a proprietor or a proposed transferee.[22] It will be suggested (below) that this potential danger is one of the things which must be balanced against the possible advantages of allowing a title to be acquired by adverse possession to registered land. A second factor which will (below) be balanced against the possible advantages of permitting adverse possession, is the cost of the inspections which purchasers must necessarily make for their own security. But first the possible advantages of permitting acquisition of title by adverse possession, must be considered.

(a) Staleness

It was pointed out, above, that the case for refusing to allow a title to a registered estate to be acquired by adverse possession, is usually based on an argued need to preserve certainty of titles. However, paradoxically, as Professor Whalan and others have shown, a refusal to allow the Statute to apply to registered land may itself lead to uncertainties in titles.[23]

Writing of the situation in New Zealand before the amending legislation of 1963, it was said that:

> "In many cases, and in particular, in some of the mining areas, land has been purchased, title taken and then the purchaser either has abandoned the property or in some cases disposed of it by the simple process of handing over the certificate of title (sometimes with a crude form of transfer endorsed on it) on payment of the purchase money".

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21. Section 70 (1) (f).
22. For example, the adverse possession of a strip of woodland of varying width on the boundary of two estates went undetected by the purchaser in the leading case of **Chowood v. Lyall** [1930] 2 Ch.156.
23. (1963) N.Z.L.J. 524; see also Ruoff, Torrens System, 56,57,326.

In such cases, after lapse of time, it was not always possible to establish and clear the title satisfactorily.[24] Some gauge of the extent of the problem in New Zealand can be gained from the estimate[25] that in Auckland province "in two and a half per centum of the 36,000 limited titles that were issued under the Compulsory Act, the register book does not reflect a true picture of entitlement because there is a squatter in possession".

A similar state of affairs came about, for similar reasons, in some states in Australia. In New South Wales in 1976 it was estimated that the number of parcels occupied by persons not registered as proprietors (i.e. by squatters) ran into thousands. In the vast majority of those cases it was thought that there was no possibility of the occupation being disturbed, and yet the impossibility of obtaining a title by adverse possession meant that mortgages could not be obtained, with the result that the land remained undeveloped, or developed to considerably less than its potential.[26]

Experience in N.Z. and Australia therefore suggests that, in some jurisdictions and possibly for special local reasons, there is a danger that dispositions will take place off the register and that, with passage of time, evidence necessary to prove the disposition will perish. If such circumstances exist, then there is a good case for a limitation rule to guard against the danger. Does this danger exist in this country?

It seems to the writer that there are no obvious "special factors" present in England and Wales today which makes improper "off-register" dispositions particularly likely. Although the distribution of conveyancers throughout the jurisdiction is not uniform, there is today no area in which there are no competent practitioners, able and willing to undertake conveyancing.

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24. Ruoff, Torrens, 57.
25. Ruoff, Torrens, 56.
26. 1976, Registrar General's Office, N.S.W., Working Paper on Application to Torrens Title land of law relating to Limitation of Actions, para. 1.5. The Statute in N.S.W. has since been modified to permit acquisition of title by adverse possession in limited circumstances (Woodman & Butt, (1980) 54 A.L.J. 79).

Nor is there (in the profession) widespread ignorance or distrust of the land registration system, or unsettled social conditions of the type which led to the informal dispositions referred to by Professor Whalan. Nevertheless, it remains possible that lay persons, acting without professional assistance, might enter into arrangements (e.g. in cases of small parcels of low value or in case of dispositions within a family or between neighbours) without necessarily appreciating the need for the arrangements to be completed on the register. Enforceable, but off-register, dispositions clearly might occur.[27]

In such cases, where a person with a good but improperly completed claim has gone into possession, it is also clearly possible that, with passage of time, evidence may be lost and it may become impossible to prove the claim, or indeed to discover the whereabouts of the registered proprietor so as to regularise the transaction. Such cases are clearly possible.

However, the writer would suggest that the risk of such cases actually occurring is not so great as to justify the present relatively short limitation period of 12 years. It seems to the writer unlikely that all knowledge and evidence supporting an attempted informal disposition will frequently perish with so short a period. A longer period - between 20 and 30 years perhaps - would seem justified if staleness were the only reason for the Statute to impose a time bar.

Nor does the danger of staleness seem to justify the application to registered land of some other aspects of the law of adverse possession. Possibly the need to avoid stale claims and provide certainty of title justifies the application to registered land of the rule that time may run against an owner notwithstanding that he did not know and could not have discovered

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27. The possibility is contemplated by L.R.A. 1925, Part IX - "Unregistered dealings with registered land".

that time was running against him. The same factors probably also justify the absence of a requirement that anyone relying on the Statute should be obliged to prove that he entered in good faith and not as a deliberate land-grabber.

However, the rule that time may run against a lessor where rent is unpaid under an oral periodic tenancy is difficult to support on grounds of staleness. In a number of cases this rule has operated to deprive an innocent or careless landlord of his whole title in circumstances where no question of staleness was involved.[28] To justify, on grounds of staleness, the rule that time runs if rent is unpaid under an oral periodic tenancy one has to imagine:

> That a lessor has sold or otherwise attempted to transfer the property to his former lessee;
>
> that he has done so informally;
>
> that all evidence of the informal transaction has vanished; but that evidence of the original lease has not perished;
>
> that all this can occur within 13 years.
>
> This is fanciful. [29]

There is, however, one way in which a case can be made for the retention of the present 12 year period on grounds of staleness. Where an off-register disposition has occurred, it may still be possible even after 12 years to prove that disposition and so regularise the position on the register.

But after 12 years, this will inevitably require time and effort. It will be expensive. A case might therefore be made for the 12 year period on

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28. E.g. **Jessamine v. Schwartz** [1976] 3 All E.R.322, C.A. **Spectrum v. Holmes** [1981] 1 All E.R.6.
29. This rule might be justified on grounds of staleness or, possible, hardship if the limitation period were extended to 20 or 30 years. But in that event, the rule might in any event be safely repealed and the Court simply left to decide, in any particular case, whether the fact of long possession by a "lessee" without payment of rent justified the presumption that the tenancy had been determined even though no notice to quit could be proved.

the grounds that it provides a simpler and cheaper way of resolving a conveyancing problem than an expensive reconstruction of the title by investigation.

It seems to the writer that this argument is entitled to a little consideration. But the saving in conveyancing costs which, on this argument, the Statute offers to an informal transferee must be balanced against two dangerous consequences which the Statute invariably carries with it; the danger of allowing titles to be acquired by deliberate land-grabbers and the danger of depriving a blameless owner of his land without compensation if time can run against a proprietor who did not know and could not have discovered the existence of the adverse possession. For if the Statute has any role to play at all in avoiding stale claims and providing certainty of title, both these consequences are unavoidable. In all the circumstances, viz:

> the likelihood (small) that off-register dispositions will occur;
>
> the likely circumstances (limited) in which such dispositions might occur;
>
> the possible saving of costs held out by the curative effect of the Statute;
>
> the risk of hard cases if adverse possession is allowed;
>
> the alternative ways of solving some "off-register" problems; (see below under "Boundaries")

it seems to the writer that a rather longer basic limitation period is justified, so far as aim of avoiding staleness is concerned.

(b) Hardship

The second general ground on which the Statute of Limitations has been said to rest is the desire to avoid hardship to a defendant in possession. In unregistered land, the effect of the Statute can be justified on grounds of hardship in a variety of special circumstances. The 'squatter' may, for

example, be a quite innocent trespasser who, e.g. entered under a mistaken interpretation of a will, or a purchaser who made a reasonable mistake as to the location of a boundary. Hardship may also arise if the squatter has invested time or money in improving or developing the land, or has made alterations to his own adjoining property in reliance on a belief in his own entitlement to the land in dispute. Alternatively, and still in the case of unregistered land, it may be possible to show hardship if a long possessor is ejected, simply on the grounds of disappointment of settled expectations. Justice Holmes was a lyrical and constant exponent of this view:

> "A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it."[30]

There is little doubt, therefore, that in the case of unregistered land, the Statute may usefully guard against hardship to a defendant. Of course, it is worth restating here a point noted in Chapter 3, that the Statute may also work great hardship to a time-barred owner. As has been seen, time may run notwithstanding that the true owner did not know and could not have discovered that time was running against him. No attempt is made by the Statute to balance possible hardship to a plaintiff against possible hardship to the defendant, save that the length of the limitation period is fixed with this problem in mind. The time bar is in case of actions to recover land, automatic and not discretionary. However, it must now be seen whether the possibility of hardship justifies the application of the limitation rule to registered estates. In general it seems to the writer that, so far as registered land is concerned, the case for a statutory bar to prevent hardship to possessors is different and, possibly, weaker.

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30. Holmes, (1897) 10 Harv. L.R. 457, 477.

Cases where a possessor has entered innocently under a mistake (e.g. as to the effect of a will) are unlikely to cause such great problems where registered land is involved. If the mistake is not discovered and the possessor is registered as proprietor, then (a) it may not be possible in any event to rectify the register against the proprietor in possession,[31] but (b) if it is possible, and rectification is ordered, then the disappointed registered proprietor may well be entitled to compensation from public funds by way of indemnity, for loss caused by rectification.[32]

It is outside the scope of this thesis to embark on a detailed analysis of the advantages of the land registration system; nevertheless, in passing, it is notable that the statutory scheme by which (i) the legal estate is vested beyond dispute in the registered proprietor and (ii) the provisions for rectification and indemnity provide a more immediate (i.e. instantly on registration - not after lapse of time) more flexible,[33] and more just solution to the type of problems in question, then the Statute of Limitations is capable of achieving on its own.

Similar considerations arise in the case of the "unentitled occupier" who improves registered land at his own expense. If an occupier has entered under a mistaken belief of right and has been registered as proprietor, then he will have the benefit of the statutory restriction on rectification against a registered proprietor in possession,[34] whilst any disappointed owner may be able to obtain indemnity; but if rectification is ordered against the "unen-

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31. L.R.A. 1925, s.82 (3).
32. L.R.A. 1925, s.83.
33. The Court is entitled to look at all the circumstances when considering an application for rectification. Thus it is entitled to look at the harm which would be done by making or not making the order and this includes consideration of the use for which the property is required, its effect on other property of the party in question and any expenditure which has been incurred. See Hayton, Registered Land, Chapter 9.
34. L.R.A. 1925, s.83 (3).

titled" registered proprietor then he may (provided he has not caused or contributed to the error by fraud or want of proper care) also in turn be entitled to indemnity.[35]

In both cases discussed so far, the role of the Statute of Limitations is limited. It merely provides a cut-off point after which rectification cannot be ordered against the registered proprietor in possession.

The role which the Statute ought to play seems to be equally limited when we then examine the possibility of hardship to one who is in possession of a registered estate on which he has spent money but who has **not** been registered as proprietor. If a person in possession of a registered estate has not been registered as proprietor, then arguably he has or ought to be regarded as having less claim to the protection of the Statute of Limitations simply because he has spent money on the land. If such a person has done so in full knowledge of his own lack of right and without the approval of the owner, then he has little claim to any special consideration on grounds of hardship. Similarly, if he has done so after a culpable error as to his entitlement, then again, it would seem that he has little claim to the protection of the Statute on grounds of hardship. At this stage of the argument, of course, when the issue turns on whether the possessor knew or ought to have known of his own lack of entitlement, it is relevant to bear in mind that, in the case of registered land, it is easy (by search of the Index Map and Parcels Index) to discover whether a title is registered, and it is not difficult to discover whether it is registered in the searcher. The writer therefore doubts whether, in general, any special consideration ought to be given on grounds of hardship to a possessor who has incurred expenditure in developing or improving land the title to which is registered in another.

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35. L.R.A. 1925, s.82 (3).

However, reasonable mistakes can be made and problems can occur in identifying parcels or, more important, in identifying boundaries accurately on the ground.[36] And after many years, disturbance by ejectment of even a deliberate trespasser might also give rise to hardship. Nevertheless, even in these types of case the role of the Statute may be limited. For the untitled improver or developer of land may well in many cases be able to rely on an alternative defence such as estoppel or acquiesence.[37] Those defences may provide better protection in the cases in which they are available than a plea of time, in that they are available immediately on the occurrence of the relevant events, rather than only after lapse of at least 12 years. Defences such as estoppel also have the juridical advantage that they take account of the conduct of both parties, and not merely the possibility of hardship to one. But being more flexible, such defences are necesarily less certain in application than the Statute of Limitations. Consequently, there may well be a good case for preserving the present "dual system" which recognises both types of defence; defences available in the short-term such as estoppel and acquiesence; and the additional long-term defence of the Statute which prevents difficult questions of conduct or knowledge from clouding a title to land forever and which provides, in the longer term, a certain final result.

The writer would suggest that the present 12 year period is far too long and the form of the Statute is quite inappropriate for it to be regarded as an adequate short-term solution to problems caused by development or improvement to the land of another. On the other hand, it is also suggested that the present limitation period is not long enough if the Statute is merely intended - on grounds of hardship - as the ultimate longstop against old

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36. This problem is discussed further, below, under "Boundaries".
37. Discussed above, Chapter 10, Trusts.

claims and if it is to continue (as it must) to be framed so as to operate (i) whether or not the owner knows that the limitation period is running against him and (ii) however culpable the squatter may be. On these assumptions, it is suggested that a long-stop limitation period of between 20 and 30 years would be more appropriate.[38]

The final illustration of circumstances giving rise to hardship which was mentioned in the opening paragraph of this section, was the case of untitled possessor who might be thought to suffer hardship if deprived of the land after many years enjoyment of it even though his possession commenced without any colour of right or title. In the nature of things, this seems most likely to occur in the case of unused, or abandoned land (a topic which is considered separately, below), particularly in relation to small parcels on or near boundaries with no great economic value:

> "A strip of derelict land may become absorbed into an adjoining garden when it forms part of the site of a projected road or building development which has never been completed or part of the site of a passageway which has fallen into disuse".[39]

The hardship which might arise if, in such a case, the possessor is disturbed after many years occupation will be the same whether the land has a registered or an unregistered title. Now of course, in both cases, it is possible that hardship might also be caused to the true owner who is deprived

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38. If the existing "short-term" defences are thought inadequate, the problem might best be solved by legislation providing a judicial discretion. Such legislation exists in other jurisdictions e.g. the Land Titles Act 1970, (Alberta), c.198, s.183 provides for reasonable mistakes by enacting that where a person has made a lasting improvement to the land of another, the Court may either allow him to keep the land on payment of compensation, or grant a lien over it to the value of the improvements.

    The Law of Property Act, 1970 (Manitoba) provides a slightly different scheme. It applies to encroaching buildings and gives the Court a discretion to grant an "easement" for the life of the building, or to vest title on payment of compensation or to order removal of the encroachment.

    See also Encroachment of Buildings Act (NSW) 1922, ss.9 and 13.

39. Chief Land Registrar, Evidence to the Law Reform Committee, 1972.

of his rights by the Statute, unless the Statute can ensure (which it does not) that time cannot run unless the owner knows, or at least, ought to know, of the threat to his title. But it does not seem possible for the Statute to do this.

In the case of unregistered land, for the conveyancing reasons outlined in this thesis, and in order to avoid staleness, there is an overwhelming case for sacrificing the true owner's claim in the few cases in which he is actually without fault, to the public interest in ensuring cheap and speedy transmission of estates.

On the other hand, where registered land is concerned, the case for barring innocent owners is weaker, simply because the same conveyancing reasons do not apply. It seems to the writer that the claim of a long possessor to remain in undisturbed possession just because he has been there for many years is not one which - without more - ought to prevail against an innocent owner. Of course, there are other policy reasons mentioned in this chapter - quite apart from hardship - which do seem to justify the application to registered land of the general limitation rule that time runs despite the owner's lack of knowledge of the existence of his cause of action. And in some cases (e.g. abandonment) and probably in all cases after a certain length of time, it becomes practically impossible to insist on proof of the state of the owner's knowledge as a pre-condition for the recognition of an adverse title. However, the writer believes this period to be longer than the present 12 years and that the statutory period would need to be at least 20 years (possibly more) to justify the operation of the Statute in relation to registered land, irrespective of the state of knowledge of the true owner. In this connection, however, it is suggested that a distinction ought to be drawn between "whole tracts" and "boundary tracts". So far as boundary tracts are concerned, a stronger case based solely on the hardship

resulting from disappointment can probably be made. The writer would suggest no extension of the existing period of limitation so far as boundary tracts are concerned. (The reasons for, and difficulties in making, the suggested distinction are examined below under the heading "Boundaries")

(c) Abandoned land

A third ground which provides some support for the application of the Statute to unregistered land is to be found in the case of abandoned land. Complete abandonment in a jurisdiction such as England and Wales might be thought unlikely. Nevertheless, at least so far as unregistered land is concerned, it is not uncommon.

.... "there are certain pockets in the country as, for example, in Essex, Kent and Sussex where land has been allowed to be derelict so as to lend itself to land grabbing...Difficulties arise in this kind of situation because the true owners are not known and, indeed, in most cases are not even aware of their ownership. In some instances I have information that the land was originally sold for development by means of Champagne Auctions following which - perhaps not surprisingly - details of title have been lost in the mists of time".[40]

However, in the case of registered land, abandonment is far less common, if it takes place at all.[41] It seems to the writer that, so far as registered land is concerned, the possibility of abandonment of significant areas is so remote that little or no account need be taken of it in framing a limitation rule.

(d) Boundaries

This is the fourth and final point to be made in favour of allowing the Statute to operate against a registered title. The point arises because of the well-known "general boundaries" rule.

Although our domestic land registration system in effect guarantees

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40. Chief Land Registrar, Evidence. The writer knows of similar pockets in Berkshire.
41. Chief Land Registrar, Evidence, p.2. Possibly the dangers posed by abandoned land will increase as the system of title registration is exten ded.

the title of a registered proprietor, it does not (unusually in title registration systems) invariably guarantee the extent of the boundaries of that title. It does so only where the boundaries are "fixed". The fixing of boundaries is highly unusual. Usually (unless the contrary has been noted)[42] the filed plan or general map indicates the general boundaries only; the exact line of the boundary is left undetermined on the register.

The origins of this rule lie in the origins of the modern compulsory registration system. Under the Land Registry Act 1862, maps and plans were required to show the exact boundaries of registered property. This

> "involved a perambulation of boundaries and exhaustive inquiries of adjoining owners and the examination of their titles, all of which, almost inevitably, brought many needless disputes in their train....[43]
>
> ...the fact that a landowner voluntarily applied for registration of his title usually brought to a head boundary questions that had remained in abeyance, sometimes for centuries, and which would, apart from the inquiries, so have remained for ever without causing any trouble".

The Land Transfer Commission (1870) which sat to review the operation of Act of 1862, thought that the requirement to identify exact boundaries interfered with registration of title and was unnecessary. They thought that purchasers investigating title should identify boundaries themselves in the usual way,[44] that is to say, by ensuring that the title dealt with in the abstract was identified on the ground within its physical boundaries. They added:

> "If there is any border land over which the precise boundary is obscure, it is usually something of very trifling value and the purchaser is content to take the property as his vendor had it, and let all questions of boundary lie dormant"[45]

As a result of this recommendation, the law was altered.[46] Under the

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42. L.R.R. 1925, r.278.
43. Ruoff and Roper, 4th ed., p.153.
44. Ruoff and Roper.
45. Report, p. 21.
46. L.T.A. 1875, s.83 (5).

present rule, the map continues to show only the physical boundaries,[47] which may or may not coincide with the legal boundaries. If there is a provable discrepancy[48] between the two then it is the Statute of Limitations which will ultimately ensure that the physical boundaries are also the legal boundaries. Is this fair?

An assessment of the fairness of the Statute in application to the boundaries of registered estates must take account of the position of

(i) purchasers of the property benefiting from an encroachment;

(ii) purchasers of property suffering an encroachment and

(iii) the position as between the respective "dominant" and "servient" owners themselves.

It is arguable that the Statute of Limitations has a useful role to play - where it applies - in buttressing the general boundaries rule in favour of purchasers of both encroaching and encroached upon titles. All such persons get what they see on the ground, if it has been there long enough.

> "Prospective purchasers are usually interested in acquiring land on the basis of its actual physical boundaries".[49]

It is true, of course, that there are conditions and exceptions which may in theory limit the utility of the Statute. But in other parts of this thesis it has been suggested that these conditions/exceptions have only a limited effect on the utility of the time bar. There are also conceptual and evidential problems. But in modern cases, the Court has shown a marked

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47. Dimensions are shown only where the boundary is imaginary.
48. Comparatively narrow strips may be involved. The examples given in L.R.R. 1925, r.278 include whether the title "includes a hedge or wall and ditch, or runs along the centre of a wall or fence, or its inner or outer face". But wider strips can be involved, e.g. the general boundaries rule leaves open the question of how far a boundary is within or beyond a wall or fence; or whether the land includes the whole of an adjoining road or stream.
49. Law Commission, British Columbia, Report (1974) on Statute of Limitations, p.52.

tendency, whenever possible, to use the actual physical boundaries as a reliable guide to possession.[50]

It ought perhaps to be pointed out that nowadays purchasers of registered estates rarely in practice investigate the duration of a particular physical boundary. Indeed, standard conditions of sale usually absolve vendors from responsibility to define or show title to boundaries. This seems safe practice where physical boundaries are firmly established, the vendor denies (in reply to the usual inquiry) the existence of disputes and there are no special circumstances on the ground or in the plan or on comparison of the two, to excite suspicion.

Even where the boundaries are obviously less than 12 years old, in the circumstances outlined above the same practice is adopted and is safe. In practice, therefore, it is fair to say that purchasers seem to rely consciously only to a limited extent on the guarantee provided by the Statute that old physical boundaries are also actual boundaries.

So far as concerns adjoining owners - as distinct from prospective owners - the operation of the Statute on the boundaries of registered estates also seems to be fair and reasonable. It is true that the proprietor suffering the encroachment may - by virtue of the Statute - lose land without being aware of it. However

> "If the possession has continued long enough to be the established and expected allocation of use, legitimation of the possession is probably justified".[51]

This seems to be sound policy, especially in a jurisdiction such as our own where the plans used in unregistered conveyancing have a notorious tendency

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50. **Re Boyle's Claim** [1961] 1 W.L.R. 339; **Epps v. Esso** [1973] 1 W.L.R. 1071; **McCurdy v. Laing**, C.A., unrep., 19/1/1978, No.70 of 1978; **Williams v. Usherwood** [1983] 45 P.& C.R.235.
51. Ontario Law Reform Commission, Report on Statute of Limitations, 1969, 44.

to be unreliable. In the case of boundaries, therefore, a limitation period corresponding to the general period applicable to unregistered land (the registered land 'general boundaries' rule being modelled on unregistered conveyancing practice) ought to be preserved.[52]

It is true that if all the writer's suggestions were adopted, a distinction would have to be drawn between boundary strips and all other parcels. It might be difficult to draw this distinction in some cases

> "A distinction between title and boundaries might be useful but we feel the complexity and uncertainty it would create would be too great"[53]

The writer would, however, respectfully differ from this opinion of the Ontario Law Reform Commission. The problem is over emphasised. Our own existing general boundaries rule requires, in effect, a distinction to be made between boundaries and other parcels. This does not give rise to practical problems.[54]

However, for those less confident than the writer, another possible solution exists. It might be possible to fix a longer limitation period for boundaries - i.e. the same period as that suggested for tracts of registered land - if there were other mode of dealing with boundary discrepancies in the short term. One such way would be to give the Court (or the Lands Tribunal) discretion to fix boundaries wherever boundary fences (or buildings or other encroachments) have been improperly located. This might be done by providing that if a boundary fence has been improperly located, then the Court might, at its discretion, either: order a transfer from the owner

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52. Even in jurisdictions were acquisition of title by adverse possession of registered land is not permitted, the case for a rule applicable to boundaries is often admitted: see **Turner v. Myerson** (1917) 18 S.R.133. British Columbia Law Commission, Report, 1974, p.52. A bill was introduced here in 1887 which would, if passed, have created such a special rule: Land Transfer Bill, 1887, cl.19.
53. Ontario Report, cited above, p.45.
54. Interestingly, the Ontario Land Titles Act 1950 (R.S.O. 1950, c.197) s.23 (1) (c) drew a distinction between boundaries and tracts. See also the Property Law Amendment Act 1950 (N.Z.) s.3.

to the possessor, subject to payment of fair compensation fixed by the Court; or declare the encroaching owner to be entitled to continue in occupation on such terms and for such period as the Court may fix; or, alternatively, order removal of any encroachment. In the short term, if innocently misplaced fences etc., have been established and relied on (it would be necessary to avoid aiding deliberate land grabbing) such a statutory provision would give the Court the degree of flexibility required to achieve a just result.

Such a solution would also have further advantages. First, the present limitation rule applies only if the claimant can establish that he has been in possession. Despite the existence of a physical boundary, there are several (oldish) decided cases in which the Court has had difficulty in finding that the claimant had possession of a narrow strip within a physical boundary.[55] Second, the limitation rule only applies after a minimum of 12 years. Difficult cases can naturally occur in a shorter period.

Third, it is possible that even where time has run, the Statute cannot solve problems caused by the inaccurate laying out of a leasehold housing development on registered land. The reason is that it is possible[56] that any tenant who has suffered a "boundary encroachment" caused by a discrepancy between his title on the plan and the estate as laid out on the ground, may (even after 12 years) surrender the land to his landlord, who might then re-enter on the disputed strip and revest it in the surrenderor. This possibility has troubled the Chief Lane Registrar.[57]

The writer does not share the Chief Land Registrar's fears.

It seems to the present writer that a **common** lessor, or his successor (and in the case of leasehold developments, there is almost invariably a

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55. E.g. **Kynoch v. Rowlands** [1912] 1 Ch.527. (Cattle grazing over notional boundary and up to actual fence).
56. **Fairweather v. St. Marylebone** [1962] A.C. 420; cf. **Spectrum v. Holmes** [1981] 1 All E.R.6.
57. Registered land practice notes, "Boundary Discrepancies on Leasehold Building Estates".

a common lessor) would not be allowed in equity to take part in a collusive surrender/regrant with one of his tenants to the prejudice of another, especially in circumstances where the common lessor was himself responsible for the original error as developer. It also seems to the writer that the doctrine of lost grant could be applied between adjoining lessees so as to prevent a collusive surrender.[58] However, whether the Chief Land Registrar's fears are realistic or not, the existence does possibly provide some support for the suggested statutory provision dealing with boundaries.

4. Summary - Section II

This section considers the case for permitting adverse possession of registered land. The general conclusion reached is that the Statute does have a role to play in relation to registered land, although that role is more limited than in the case of unregistered titles:

> "If we had a scientific system for the registration of titles, adverse possession would be of far less importance".[59]

We now have; and it is. Nevertheless, it is thought that the Statute ought to continue to apply to registered land, notwithstanding that this means that a proposed transferee cannot rely on the register alone but must inspect the land itself. This is in fact unobjectionable since it adds nothing to conveyancing costs; inspection is in any event required to discover whether the land is subject to a wide variety of possible claims, of which adverse possession is one of the more remote. So long as it remains a fundamental general principle of the land registration system that purchasers must inspect, there is no reason to refuse to allow the Statute to apply to registered land. However, although it is thought that the Statute ought to continue to apply

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58. See **East Stonehouse U.D.C.v. Willougby** [1902] 2 K.B. 318, 323.
59. Ballantine, (1918) Harv. L.R. 135, 143.

to registered land, a subsidiary conclusion is that there is little need for a limitation period shorter than 20 years (with one exception, in the case of boundaries). A minimum period of about 20 years would seem to be able to fulfil the limited objectives of the Statute in the case of registered land and would go some way to avoiding the possibility of hardship which might (in rare circumstances) be caused to a registered proprietor or to a transferee who finds himself time-barred without any fault on his part.

Of course, the appropriate length for a limitation period, bearing in mind the objectives of the Statute and the dangers which it poses, is very much a matter of opinion. There can be no single right answer. If the general opinion were that the present 12 year minimum period applicable to registered land ought to be preserved because it fulfills useful purposes, then the writer would suggest that a time-barred registered proprietor ought to be compensated, by being allowed to claim indemnity on the usual basis on proving (and the burden of proof would be on the registered proprietor) that he did not know and could not have discovered that time was running against him. A transferee ought similarly to be allowed to claim indemnity in those rare cases in which the adverse possession could not have been discovered on a reasonable inspection of the property. It is thought that such claims would be very rare in practice.

III - Special rules applicable to registered land

This final section of chapter 15 deals with the modifications necessary to adapt the general law of limitation of actions and the land registration scheme to suit each other. General rules of the law of limitations considered in other parts of this thesis are not dealt with here unless subject to some modification or alteration when applied to registered land. The suggested changes mentioned in Part II of this chapter are not repeated here.

There are three "special rules" which require mention.[60] They are - (i) the specific provision (L.R.A. 1925, s.75) permitting acquisition of title by adverse possession; (ii) the inclusion of "rights acquired or in the course of being acquired under the Limitation Acts" in the list of overriding interests contained in L.R.A. 1925, s.70(1); and (iii) the vexed rule (L.R.A. 1925, s.75) which modifies the normal provision of the Limitation Act which extinguishes the title of a time-barred owner at the end of the limitation period.

(i) Section 75

> "The Limitation Acts[61] shall apply to registered land in the same manner and to the same extent as those Acts apply to land not registered..."

The reasons for applying the Statute of Limitation to registered land were discussed in Part II of this chapter. The present provision makes it clear that the Statute does in fact apply to registered land. In the absence of this provision, it might be a matter of doubt whether the Statute did so apply. It is true that in the leading case of **Belize v. Quilter,**[62] a case which dealt with registration legislation which neither expressly subjected nor expressly exempted registered land from the operation of the Statute, the Privy Council advised that the Statute did apply, on the basis that if

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60. Section 34 (2) (power of a mortgagee to be registered as proprietor where mortgage is time-barred) is not specifically discussed in this chapter.
61. I.e. the Limitation Act 1980, see section 3; L.R.A. 1925 as modified by Interpretation Act, 1977, s.17; cf. Preston and Newsom, Limitations, 3rd ed., p.85.
62. [1897] A.C.367, P.C., on appeal from the Supreme Court of British Honduras.

the Statute of Limitations is not to apply to a particular registration system, then

> "One would expect to find an exceptional proviso of that kind expressed in plain language".[63]

However, that case has been criticized and/or distinguished in other jurisdictions on the grounds that (a) it is only relevant where the registration legislation is completely silent on the question of whether title can be acquired by adverse possession; or (b) it is only relevant where the registered title in question is not one declared by the legislation to be "indefeasible", as is the case in most Torrens' title systems; and/or (c) registration in British Honduras was only permissive, not compulsory.[64] Desirably, therefore, the first part of s.75 puts the point beyond doubt.

(ii) Section 70 (1) (f)

> "(1) All registered land shall...be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto...
>
> (f) Subject to the provisions of this Act, rights acquired or in the course of being acquired under the Limitation Acts."[65]

This provision originated in the Land Transfer Act 1897, schedule 1, which amended s.18 of the Act of 1875. Its original object was obscure.[66] However, the effect of the current rule is a little easier to state.

The effect of the provision is to apply to registered land the general limitation rule that once time has started to run, it runs continuously, and that once the limitation period has expired, that is the end of the matter; the clock cannot be wound back. In the absence of s.70 (1) (f), it might

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63. Op. cit., p.371.
64. See e.g. **Smith v. National Trust Co.** (1912) 45 S.C.R.618, **Gatz v. Kisiw** (1959) S.C.R.10.
65. The implication of paragraph (f), viz. that rights are acquired by virtue of the Act rather than by virtue of possession, is considered below in connection with the proviso to section 75.
66. See Lightwood, Time Limits, p.131.

it might be argued that (even where the limitation period had expired against a registered proprietor), if the latter transferred the property and the transferee was himself registered as proprietor, then the slate would be wiped clean and time would start to run afresh against the new proprietor.[67] This argument would be substainable by virtue of the general provisions of the Land Registration legislation which specify the effect of registration of a disposition; viz, that the legal estate shall be deemed to be vested in the new registered proprietor subject only to matter on the register and to overriding interests.[68]

If rights acquired by adverse possession were not overriding interests, a transferee would take free from any squatter's claim. Section 70 (1) (f) makes it clear beyond doubt that neither first registration nor the registration of a disposition of a registered title wipes the slate clean.

(iii) Section 75 (1), (2) and (3)

This is the third and by far the most difficult of the cases in which the application of the Statute to registered land is subject to special provision. It will be recalled (Chapter 13 - effect of lapse of time) that section 17 of the Limitation Act 1980 provides, with two exceptions, for the extinction of title to land after the expiration of the time limit. Section 75 (1) contains the second of those two exceptions. It provides that:

> "...Where, if the land were not registered, the estate of the person registered as proprietor would be extinguished, such estate shall not be extinguished but shall be deemed to be held by the proprietor for the time being in trust for the person who, by virtue of the said Acts, has acquired title against any proprietor, but without prejudice to the estates and interests of any other person interested in the land whose estate or interest is not extinguished by those Acts."

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67. This was the result so far as absolute titles were concerned under the Land Transfer Act 1897. For a similar rule, see **Boyczuk v. Perry** (1948) 1 W.W.R. 510, (Alberta), Institute of Law Research and Reform, University of Alberta, Working Paper No.77; and also Tasmania, where abolition of rule recommended by Law Reform Committee, draft report on Limitation of Acts, 1977.
68. L.R.A. 1925, ss.20, 22.

Sub-sections (2) and (3) then go on to provide:

> "(2) Any person claiming to have acquired a title under the Limitation Acts to a registered estate in the land may apply to be registered as proprietor thereof.
>
> (3) The registrar shall, on being satisfied as to the applicant's title, enter the applicant as proprietor either with absolute, good leasehold, qualified, or possessory title, as the case may require..."

These provisions provoke two connected questions. First, what is the nature of the title referred to in s.75 (2) and (3); is it the squatter's own (possessory) title or is it in fact the title of the time-barred former registered proprietor? Second, what is the nature of the trust referred to in s.75 (1); is it a bare trust in which the whole beneficial interest is vested in the squatter, or is the squatter's "statutory equity" something less than this?

The Nature of the Squatter's Registrable Title

It is today trite law that, in the case of unregistered land, the squatter is not regarded as the successor or transferree of the person barred by the Statute. The squatter enters and acquires a title by virtue of his possession. That title is always freehold; it is always a fee simple absolute[69] in possession. At first, the squatter's title is wholly precarious and liable to be defeated at any moment, if the owner chooses to re-enter or commence proceedings. Later, however, once the limitation period has expired, the squatter remains under the title gained by possession, but that title is no longer precarious. It is now buttressed by the force of the Statute which both bars the former owner's right of action and extinguishes the latter's title. Further, it was settled in **Fairweather,**[70] that "extinguishment" is

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69. Notwithstanding the possibility of determination by ejection by title paramount.
70. [1963] A.C.510.

only a relative concept. The time-barred owner's title is extinguished as against the squatter, but not as against interested third parties such as a lessor when time has run against a lessee.

It is not at all clear that the position is the same in the case of registered land.

Section 75 (2) seems to imply that a squatter can seek to be registered, not with an independent title to an estate acquired by possession, but rather to precisely the same estate as that held by the registered proprietor. This implication also appears to be carried over in section 75 (3) which provides that the Registrar"...shall on being satisfied as to the applicant's title, enter the applicant as proprietor thereof". The word "thereof" appears to refer back to the words in sub-section (2) "to a registered estate", so that the Registrar, if satisfied etc., is obliged to register the applicant as proprietor of the estate in question; that is, as proprietor of the estate formerly vested in the time-barred owner.

This was in fact the way in which Browne - Wilkinson J. construed the two sub-sections in the recent case of **Spectrum Investment Co. v. Holmes,**[71] the only decided case in which the meaning of the provisions has been raised directly.

The facts of the case were that time ran in favour of the successor of a sub-tenant (C.), as against the intermediate landlord (B.), but not as against the head-landlord (A.). C. applied to be registered as proprietor of B.'s lease. The Land Registry gave notice to B.'s solicitors, but they took no action. The Land Registry then (i) closed the registration of the leasehold title under which B. was registered as proprietor of the head-lease; and (ii) they opened a new register on which C. was shown as first proprietor

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71. **Spectrum v. Holmes** [1981] 1 All E.R.6; cf. [1963] A.C.510, 543, (Lord Radcliffe).

with possessory title of the **same head-lease.** Later B. purported to surrender the head-lease to A. and subsequently commenced proceedings against C. seeking rectification of the register and various declarations. In the course of giving judgement in favour of C., and approving the steps taken by the Registrar, Brown-Wilkinson J. dealt with the meaning of both sub-sections (2) and (3) of section 75.

As to sub-section (2):

> "To my mind the words are clear and unequivocal: the squatter claims to have acquired a title to a "registered estate in the land" (i.e. the leasehold interest) and applies to be registered as proprietor **thereof** (original emphasis)"

And as to sub-section (3), the word "thereof":

> "...Can, in my judgement, only refer back to the registered estate in the land against which the squatter has acquired title under the 1939 Act, i.e. the leasehold interest. The clear words of the Act therefore seem to require that, once 12 years have run, the squatter is entitled to be registered as proprietor of the lease itself..."[72]

There is one further point in section 75 (3) which supports the construction adopted by the Registrar and by the Court in **Spectrum v. Holmes.** Section 75 (3) refers to the possibility of a squatter being registered with a "good leasehold title". Now where unregistered land is concerned, as mentioned above, the estate gained by possession is always a fee simple; the reference in s.75 (3) to a squatter being registered with a good leasehold title can only mean that the squatter is treated by the sub-section as though he acquired the estate of a time-barred owner. Thus, where a squatter takes possession of land held under lease, the sub-section contemplates that registration with a good leasehold title to **that same lease** may be appropriate. It seems, then, that the nature of the title acquired by a squatter

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72. Cited above, p.14.

may depend on whether he occupies registered or unregistered land. But the crucial question is, if the result is different according to whether the land is registered or not, and if, in the case of registered land a squatter does by some means acquire the estate of the time-barred owner, then how does this occur?

Although s.75 (2) and (3) clearly **imply** that the squatter acquires the registered proprietor's estate, neither sub-section explains how this special effect is achieved. Section 75 (2) appears to be drafted on the assumption that it is the Limitation Act which achieves the transfer. But that is not the case.

Nothing could be better settled than the principle that (apart from the possible effect of any special provision of the Land Registration Act 1925) the Statute of Limitations does not confer a title to land. The Statute does not itself operative positively to confer a title; on the contrary, it operates negatively to extinguish titles and so to buttress, negatively, titles acquired by possession. It is plain, therefore, that the words "claim to have acquired a title under the Limitation Acts" in section 75 (2) cannot be given a strictly literal meaning, since, literally no one can ever claim to have acquired a title under the Limitation Act, because the Act does not have that effect.

What, then, do the words in section 75 (2) mean?

At least two possible meanings can be suggested. But since a literal meaning is not available, both alternatives are somewhat convoluted. (1) The first possible interpretation of section 75 (2) involves three steps; (i) that the trust created by the proviso to s.75 (1) (referred to above) is a true trust; (ii) that the proviso is to be read as though it were part of the Limitation Act 1980; (iii) that the trust interest is sufficient to enable the

applicant/squatter to claim to be a person who (within the meaning of section 75 (3) of the 1925 Act) "acquired a title under the Limitation Acts".

This interpretation would achieve a form of Parliamentary Transfer. (2) The alternative interpretation is that the words of section 75 (2) "claiming to have acquired a title under the Limitation Acts to a registered estate in the land" must be read as the draftsman's inaccurate shorthand for "claim to have acquired, by adverse possession, a title to registered land in circumstances in which the right of action of a proprietor to recover possession of that land from that person has been barred by the Limitation Act". If this interpretation is correct, no form of "Parliamentary Transfer" occurs and the effect of the Statute is the same in the case of both registered and unregistered land.

Both these possible interpretations must now be considered in turn.

(1) Trust/transfer

It was noted that this argument involves 3 steps. Only the first of these steps requires substantial elaboration. The "first step" is that the trust created by the proviso to section 75 (1), is one which confers the whole beneficial interest of the proprietor on the squatter.

> ..."the estate....shall be deemed to be held...in trust for the person who... has acquired title against any proprietor..."

One point can clearly be made in favour of the present argument; that is, that there is nothing in s.75 (1) which obviously confines the word "trust" to any special or limited meaning and that consequently, Parliament might

be taken to have been using the word in its natural or accustomed sense, so that the squatter takes all.

However, a search for the sense in which Parliament used this word uncovers the first of several points which can be made against construing "trust" in a large or liberal sense.

The immediate origins of s.75 (1) are to be found in two reports; the second and final Report of the Royal Commission on the Land Transfer Acts (1911)[73] and the report of the Scott Committee.[74]

The Royal Commission dealt shortly with the general issue of whether registered land should be subject to adverse possession:

> "We think that the Statute of Limitation should operate with regard to registered land in the same manner as with regard to unregistered land; so that when the title of the registered proprietor has become extinguished by virtue of those Statutes, the person who has acquired a title against him should be entitled to an order for the rectification of the register by the substitution of his name as registered proprietor. ....The rectification should, in our opinion, extend to the displacement of all estates and rights which have become barred by the Statutes, though of course the estates or rights of any mortgagees or other person whose estates or rights remain unbarred, should be preserved."[75]

The Scott Committee concurred, without elaboration, with the Royal Commissions recommendations. But the Committee did add, tantalizingly:[76]

> "It is to be observed that registered estates cannot properly be extinguished under the Statutes of Limitation, but the registered proprietor can be made a trustee for the person who has acquired a title by possession and the latter should be given a right to apply to be registered as proprietor."[77]

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73. Cd. 5483.
74. Fourth Report of the Acquisition and Valuation of Land Committee on the Transfer of Land in England and wales, 1919, Cmd. 424.
75. Report, para.81.
76. Report, para.31.
77. A textual comparison of the recommendations in the two reports and the legislation suggests that the draftsman of the 1925 Act treated the reports as his instructions and, to a small extent, adopted the actual wording of the recommendations.

The Committee, therefore, whilst accepting the Royal Commission's recommendations, thought that a qualification ought to be introduced to modify the "extinguishment' rule where registered land was concerned. This particular recommendation was made in the Scott Committee's report in a summary fashion; the reasons for the recommendation were not set out. This does cast some light on the Committee's intentions. If the Committee had been concerned only because they were dealing with a point of limitation law of which they disapproved - that is to say, if they had disapproved of the general idea of "extinguishment" and preferred the notion of a "Parliamentary transfer" - it is a reasonable deduction that they would have enlarged on the issue, said that they did not care for the general rule providing for extinguishment; and said that they refused to recommend it be applied to their system of registration of title.

They did none of these things. And they did not do so - in all probability - because they were not at all concerned with the general merits[78] of the great limitation debate between the two rival theories of "independent title" and "Parliamentary transfer".

The Scott Committee was in the passage cited, concerned only with registered land. It seems much more likely that they objected to "extinguishment" only because they thought it was in some way inconsistent or incompatible with the proposed registration system:

> "It is to be observed that registered estates cannot properly be extinguished under the Statutes of Limitation..."

There is no reference here to any general dislike of the idea of "extinguishment"; rather that there is something in the nature of registered estates which was thought to make "extinguishment" inappropriate.

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78. Discussed in Chapter 14 above.
79. Report, para. 31, emphasis supplied.

What was that special factor?

The writer would suggest that the Committee may have believed that statutory extinguishment might prejudice estates or interests in the registered land of persons other than the time-barred proprietor; persons whose estates or interests were not themselves barred by the Statute.[80] The fear seems to have been that, if a registered estate was automatically extinguished by the Statute, then other related (but unbarred) estates - derivative estates - might also fall and be extinguished with it. This fear is, as we now know, unfounded; the decision of the House of Lords in **Fairweather**[81] that "extinguishment" has only a relative effect means that today neither superior nor derivative estates created before the commencement of adverse possession are put at risk because of extinguishment.[82] But in 1919 the Scott Committee cannot be blamed for failing to foresee that "extinguishment" would one day be given such a highly selective operation.

It seems to the writer, therefore, that the Scott Committee's recommendation was intended merely to ensure that the Statute of Limitations did not operate to prejudice the interests of innocent, unbarred third parties. It does not seem to have been intended to confer any special benefits on squatters on registered land. In these circumstances, it is suggested that "trust" in section 75 (1) ought to be treated as doing no more than was intended; it ought to be treated as merely giving the squatter the right to have the proprietor's registration of title closed or extinguished on the register in the same circumstances and to the same extent as that title

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80. Concern to protect such persons is demonstrated in both Reports; Royal Commission, Report, para. 81, last sentence (quoted in text above); and also in the legislation; section 75 (1) last sentence, (quoted in text above).
81. [1963] A.C.510.
82. The decision in **Re Nisbet and Pott's Contract** [1906] 1 Ch.386, achieved a similar result by different means so far as 'derivative' equitable interests in unregistered land are concerned.

would be extinguished if the land were unregistered. In other words, the "trust" should be regarded as nothing more than a right vested in the squatter to require the registered proprietor's estate to be "extinguished" on the register.

Although this suggested way of interpreting the section cannot be supported by direct contemporary evidence, and whilst there is no decision directly in point, nevertheless this is the interpretation which, on balance, seems to have commended itself to the Courts and to commentators. In **Fairweaweather**, Lord Denning said (obiter) of s.75 (1):

> "It is machinery so as to apply the Limitation Acts to registered land but it does not alter the substantic position very materially".[83]

Sir John Pennycuick took the same view of s.75, (again obiter) in the more recent case **Jessamine Investment Co., v. Schwartz:**

> "I should be very reluctant to introduce a substantive distinction in the application of a provision of the Limitation Act 1939 to registered and unregistered land respectively, **based on what is plainly a convey ancing device designed to adapt that provision to the former class of land".**[84]

No doubt part of the judicial reluctance to treat s.75 (1) as creating a substantive trust can be explained by the problems which it would lead to. This certainly seems to have influenced Lord Radcliffe in **Fairweather,** his Lordship stating that he was:

> "not at all satisfied that s.75 (1) does create a trust interest in the squatter of the kind that one would expect from the words used. So to hold would raise difficulties which I do not now explore".[85]

It is not clear precisely what difficulties Lord Radcliffe had in mind.

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83. [1963] A.C.510, 548.
84. [1976] 3 All E.R.521, 530, emphasis supplied.
85. [1963] A.C.510, 542.

Probably the difficulties envisaged were some (at least) of those which arise in the case of unregistered land and which were considered in Chapter 14 (above) in connection with the discredited "Parliamentary Conveyance" theory. The difficulties were suggested (Chapter 14) to include: (i) the absence of a clear foundation for the doctrine; (ii) the undesirable automatic transfer of liabilities; (iii) the danger of automatic transfer operating to the prejudice of third parties; and (iv) consequential theoretical difficulties.

These four disadvantages do not arise in quite the same way in the case of registered land. They do not, therefore, present quite so conclusive an argument against adaption of the "transfer" theory of the operation of the Statute of Limitations.

(i) Foundations

In the case of registered land, just as in the case of unregistered estates, there is a lack of clear legislative foundation for the notion of a transfer from a time-barred proprietor to the squatter; however, the 'trust' mentioned in s.75 (1) - although it does not provide an indisputable basis - could be made to provide a more or less satisfactory foundation for the transfer notice, if all other things were equal.

(ii) Automatic transfer of liabilities

It is here that perhaps the most important point of distinction might be found between unregistered and registered land. It was suggested in Chapter 14 (above) that the most serious criticism which can be levelled against Parliamentary Conveyance doctrine is that the doctrine would lead to automatic transfer of certain liabilities from the former owner to the person in possession at the end of the limitation period and that it would do this even where a person in possession was aware neither of the liability nor of the fact that time was running in his favour.

However, it is not clear that 'automatic transfer' would take place

in the case of registered land, even if the trust in section 75 (1) were treated as a substantive institution. A trust is not generally a mere conduit pipe: it does not normally automatically transmit legal liabilities, via the trustee, to the beneficiaries.[86] It might therefore be possible to argue that under section 75 (1) there is no automatic transmission to the squatter of liabilities such as obligations on covenants in a registered lease. On general principles, those legal obligations remain with the registered proprietor at least until the squatter himself becomes registered as proprietor.[87] Since the squatter is, by virtue of s.75 (2), only entitled and not obliged to apply for registration, it might be possible to argue that there is no automatic transmission of liabilities - merely an assumption of liabilities by the squatter if the latter chooses to apply for registration. If this is the case (and there seems no good reason why the Registrar should not permit the contents of any lease to be inspected by the squatter by virtue of the latter's rights under the s.75 (1), before the latter decided whether or not to apply for registration)[88] it would remove much of the sting from the criticism of the "Parlia-

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86. See e.g. **Cox v. Bishop** (1857) 8 De G.M.& G. 815; **Friary, Holroyd and Healey's Breweries Ltd. v. Singleton** [1899] 1 Ch.86.
87. Cf. Lord Denning, **Fairweather** [1963] A.C. 510, 548.
88. L.R.R. 1925, r.288 allows for inspection, by any person interested in the land, of the register and documents referred to on it, after notice to the proprietor.

    If it is beyond dispute that a squatter is a person interested. However, Ruoff and Roper, 4th ed., p.671 state that the Chief Land Registrar would refuse to allow an application to inspect "by a squatter seeking to ascertain the identity of the registered owner of the land", apparently on the grounds (p.671, n) that "A person who claims that he has obtained a title by adverse possession may apply for registration, without knowing who the registered proprietor is".

    These statements suggest that a squatter would also be refused the right to inspect a registered lease.

    The legal basis on which the Chief Land Registrar has assumed a discretion to refuse inspection is doubtful; it is not conferred by the rule. The policy of refusal also seems shortsighted. If a squatter is to be fixed, on registation, with liability on covenants in a lease, he is surely entitled to inspect that lease first.

    In the case noted by Ruoff and Roper, the squatter would equally seem to have an interest in identifying the registered proprietor, to ensure that the latter is not, e.g. a minor or under disability.

mentary Conveyance theory, viz., that it can lead to automatic transfer of undiscoverable liabilities.

(iii) Automatic transmission operating to prejudice of third parties

If s.75 were, in effect, to give the squatter the unilateral right to choose whether or not to become the successor of the time-barred proprietor, the section would still be open to the objection that it could operate to the prejudice of third parties. A lessor might, for example, find himself saddled with a 'tenant' he would never have chosen, if the latter entered as a squatter and acquired the original tenant's leasehold interest.

However, if the trust arising under s.75 were held to transfer the former registered proprietor's interest to the squatter, it might be possible to draw some comfort from the fact that lessors may be able to protect themselves against the problem, if they wish, by taking a covenant against parting with possession and reserving a right of re-entry for breach.

(iv) Consequential theoretical difficulties

The final possible objection of the "true trust" theory, is that it does not provide a comprehensive explanation of the rights of the parties at all relevant times.

If, for example, the squatter acquires the registered proprietor's estate at the end of the limitation period, then one must ask, what right or title did the squatter have before that moment. He must have had some interest. If he had no interest at all, he might be ejected by any passing stranger; and without an interest he has nothing to transmit to a successor. To deal, **inter alia**, with these problems, the general common law rule is that possession gives a title. There is nothing in the statute which expressly excludes that general common law rule. On the contrary, s.75 is headed - albeit ambiguously in the light of the present discussion - "Acquisition of title

by possession".

But if the squatter does have a title by possession from the moment he enters, then one must ask what happens to that title at the end of the limitation period, when the trust in s.75 (1) first arises?

Does the squatter then have two different titles to the same piece of land? And if so, for how long? For ever? Or is the possessory title somehow remitted to or destroyed by the registered title? There are no obvious answers, although, no doubt, the construction of some explanation would not be beyond legal ingenuity.

Summary and Conclusions

The writer's general conclusions on the first suggested interpretation of section 75 are that (a) the "trust" device was probably intended only as a mechanical device to adapt the Statute of Limitations to suit the registered land system, and was probably not intended to confer the whole of the registered proprietor's beneficial interest on the squatter. However, the section could be interpreted in accordance with this first suggested meaning without impossible strain. There is some temptation to adopt this "trust/transfer" interpretation because (b) it does have practical advantages, and its disadvantages are less than those which demand the rejection of the "Parliamentary Transfer" doctrine in relation to unregistered estates. Nevertheless the writer would himself, on balance, have a slight preference for the rejection of the "trust/transfer" interpretation. But since the balance is finely drawn, opinions may clearly differ and adoption of the "trust/transfer" approach is certainly open to the Court.

Having considered the first possible interpretation of s.75 (2), it is now necessary to examine the second.

(2) Inaccurate Shorthand?

It will be recalled that the second of the two possible interpretations of s.75 (2) which were noted above, would not result in any form of transfer of a registered estate from time-barred proprietor to squatter.

The interpretation suggested was that:

> "(2) Any person claiming to have acquired a title under the Limitation Acts to a registered estate in the land may apply to be registered as proprietor thereof"

ought to be read as though it meant

> "(2) Any person claiming to have acquired, by adverse possession, an estate in land where:-
> (a) a title to an adverse estate in that land has been registered; and
> (b) the right of action of the proprietor of that registered estate to recover possession of the land has been barred by the Limitation Act,
> may apply to be registered as proprietor of the estate so acquired".

It would, no doubt, require robust determination to treat the drafting of s.75 (2) as imprecise but nevertheless as bearing the meaning suggested. But this construction is arguable. The case for and against it can be summarized as follows:

(a) The general tenor of section 75 appears to be against this construction. But if the sub-section cannot mean what it implies, (that is, that the Limitation Acts somehow effect a direct transfer from owner to squatter) and cannot be forced to bear any other meaning (e.g. the "trust/transfer" interpretation suggested above) then this second interpretation is all that is left;

(b) This construction does have the advantage that it would mean that the law would be the same in the case of both registered and unregistered land;

(c) On the practical merits, to summarize the points made in Chapter 14 above in relation to unregistered land, this construction would have the

disadvantage that it would not result in the transfer of either substantive or ancillary rights from time-barred owner to squatter, but it would have the corresponding advantage that, beyond doubt, it would not result in the automatic transfer of leasehold liabilities and would not directly affect the rights of interested third parties.

(iii) Section 75 (1), (2) and (3) - General Conclusions

There are (at least) two possible ways in which section 75 (2) could be construed. The first (the "trust/transfer" suggestion) would achieve a form of Parliamentary Transfer from time-barred proprietor to squatter in the case of registered land. The second suggested construction would not lead to any form of transfer and would mean that the effect of lapse of time was the same in the case of both registered and unregistered land. As indicated in the text the writer would, on balance, slightly incline towards adoption of the latter construction. But the point is clearly one on which opinions might differ and adoption of the "trust/transfer" approach is certainly open to the Court.

CHAPTER 16

CONCLUSIONS

This thesis has attempted to do two things. It has tried to identify the policy objectives of the law of adverse possession and the limitation of actions to recover land. At the same time, it has also tried to judge the extent to which the law is properly adapted to achieve and does achieve those objectives.

So far as the aims of the Statute are concerned, there is wide agreement that the Statute has three general objectives. Those objectives - avoidance of hardship, of stale claims and encouragement of diligence - were considered in Chapter 2; that chapter concluded that those three objectives do not adequately explain why the law of limitations is as it is. It was then suggested that the Statute does in fact have a fourth objective in so far as it deals with the limitation of claims to recover land. It was suggested - Chapter 3 - that this fourth aim is to make investigation of title in unregistered conveyancing simpler, quicker, cheaper and more reliable by providing a guarantee that a title investigated for only a limited period will nevertheless be practically secure against older claims.

This thesis has offered three proofs in support of this suggested objective.

First, it was suggested that a consideration of the reports of the official bodies on whose recommendations the modern law is based would support the hypothesis. It is now submitted that those reports (particularly the first report, 1829, of the Real Property Commissioners) leave no room at all for any doubt that, in framing the modern law of limitation of actions to recover land, a major objective was to facilitate conveyancing. The

R.P.L.A. 1833, which was the first of the modern limitation Statutes dealing with land claims, embodied the policy recommended by the Commissioners which, to summarise, was to shorten and make uniform the period of limitation with the aim of shortening abstracts and the investigation of titles by guaranteeing that outstanding claims not covered by the reduced period of investigation would be time-barred.

The second way in which this thesis has sought to demonstrate the accuracy of the hypothesis that the Statute aims to facilitate conveyancing, is by tracing the history and development of the period for which title must be proved under a contract for the sale and purchase of land. It was concluded (Chapter 12, part II) that although the two periods are not identical, nevertheless, reforms in the law of limitations and reductions in the length of the limitation period have resulted in progressive shortening of the minimum period for investigation of title, and that the Statute and the minimum period for investigation are in fact connected.

The responsibility for effecting reductions in the period for proof of titles has been borne partly by conveyancers - whose general practice has had a dominant effect - and partly on the legislature acting on the recommendations of official review bodies. In Chapter 12 it was pointed out that both conveyancers and reviewers have recognised and acted on the suggested connection between the Statute and the period for investigation of title.

The third way in which it was suggested in Chapter 1 that the hypothesis that the Statute is designed to facilitate conveyancing could be estatablished, was by analysis of the provisions of the legislation itself. It was suggested that some of the rules could not be explained as having any other objective. Rules in this latter category are not common. It seems to the writer that

the best examples are the "deemed accrual" provisions contained in the statutory date-of-accrual code (L.A. 1980, Schedule 1) which fixes the moment from which time runs in relation to claims to recover land. These "deemed accrual" provisions (see Chapters 2,4 and 5) cannot in general be satisfactorily explained by reference to any objective of the Statute other than the desire to produce a certain rule which can operate as a guarantee of security of title for the benefit of those investigating title.

Only two other examples of this type of rule seem to the writer to be fairly clear. The first is the old rule contained in the R.P.L.A. 1833 (section 25), which prevented time running against a beneficiary under an express trust until the property passed to a purchaser (with or without notice) for value. This rule was probably designed (see Chapter 12) to prevent the "interference of equity on grounds of notice", the danger of which would otherwise have given rise to the need to carry back an investigation of title for an extended period because of the rule that notice of a document (e.g. notice by mention in an abstracted document of a pre-root document) was notice of its contents. Section 25 avoided that need by barring the equity. But section 25 has now been repealed and has not been re-enacted. [The same difficulty is now avoided by different means - not by barring the old equity, but by removing the notice of it; L.P.A. 1925, s.44 (8) provides that a purchaser is not deemed to have notice of pre-root equiries unless he actually investigates]

The final rule which on its own face, also fairly clearly seems designed to buttress the guarantee of security in conveyancing which the Statute provides, is L.A. 1980, s.32 (3). Section 32, it will be recalled, (Chapter 11) postpones the limitation period in case of fraud, concealment and mistake; but by s.32 (3), the section is made inoperative against an innocent third party purchaser.

The examples cited above seem to be the only limitation rules which - on their face or by necessary implication - are designed exclusively to facilitate conveyancing or provide security of title. There are also, of course, (as this thesis has attempted to show) some rules which are probably designed only to facilitate the other general objects of the Statute (see e.g., Chapter 9, Mortgages). As to the remainder of the law of limitations (which is the bulk) the rules seem in fact to be adapted to fulfil all the aims of the Statute. The support which the "third proof" can provide for the hypothesis is therefore limited.

However, taking all the evidence together, it is submitted that there is no real doubt that one of the main aims of the Statute, so far as it applies to claims to recover land, is to facilitate the investigation of unregistered titles.

So much for the first aim of this thesis. But as explained in the introduction, this thesis does not only attempt to identify the general aims of the law of limitations. It also tries, at the same time, to judge the extent to which the law is properly adapted to achieve and does achieve those objectives.

It was suggested in the introduction that, in considering whether the Statute is "properly adapted" to achieve its objectives, it is not sufficient simply to ask whether the Statute satisfies those aims and e.g., always ensures that stale claims are barred. Even if the Statute achieved all its objectives, if it only did so in a way which was patently unfair or dangerous to owners, it would still not be "properly adapted" in the way in which that phrase is used here. The question whether the Statute is properly adapted to achive its objectives requires discussion not only of the policy behind the legislation, but also of the way in which it operates against plaintiffs.

A limitation rule which is satisfactory, it is suggested, is not one which merely achieves its aims, but one which draws a proper balance between its own aims and the need to be fair and do justice to individual claimants.

In this conclusion, it is submitted that the modern law of adverse possession and the limitation of actions to recover land does, in general, satisfactorily balance the competing interests. In attempting to do this, there are of course certain cases in which competing demands cannot all be completely satisfied. In some such cases the law has preferred the policy of limitation at the expense of unfairness to some individual owners. For example, it was pointed out in Chapter 3, that fairness to owners seems to demand that time should not run unless the plaintiff knows, or at least ought to know, that the limitation period has commenced. It also points against protecting a trespasser who has taken possession of land which he knows belongs to another, without a bona fide belief in his own right to do so.

However, years after the event, it may not be possible to readily and unmistakably determine the precise state of knowledge of either an owner or a squatter. The law could insist on taking account of such factors only at the expense of certainty and only, therefore, at some risk that the Statute might fail to achieve its own objectives. In both the examples (see Chapters 3 and 4) the law in fact prefers the limitation policy objectives to the demands of individual fairness and general morality.

Nevertheless, even in these cases, it is suggested that the law does not simply ignore, for example, the demand for individual fairness, but actually draws on appropriately weighted balance. For example, the basis of the decision that time should run despite the owner's ignorance, depended on a consideration of three factors [see Chapter 4]: (1) the importance of the Statute operating with certainty (limitation objectives); (2) the fact

that, in most cases, adverse possession is entirely obvious an inspection of the land and so will usually come to the notice of a plaintiff without delay; and (3) the fact that a reasonably long limitation period is prescribed, so that a reasonable opportunity for inspection is provided.

Of course, neither the fact that adverse possession can usually be discovered by looking, nor the provision of a long limitation period giving plenty of time for an owner to look, ensures that the owner actually will look and will discover the intrusion. Hard cases may therefore occur, since it is perfectly possible that, in some (unusual) circumstances, an entirely innocent owner will be deprived of his property, by the acts of an entirely unmeritious defendant and by the operation of the Statute. But this risk of harm to a few individuals (which is thought to be small) seems to be unavoidable in the case of unregistered land, if the larger and beneficial objectives of the Statute are to be achieved. In this instance, therefore, the weighted balance of the law of adverse possession falls on the side of limitation policy. [In the case of registered land, it was noted in Chapter 15 that it might be possible to minimize harm to the few registered proprietors who are time-barred by the Statute without fault, by entitling such persons to claim indemnity. The costs of this type of indemnity (which would probably be payable only rarely), might properly be spread amongst registered proprietors as a whole through the usual fee mechanism, since it of course registered proprietors generally who benefit from the operate of the Statute].

However, although in this instance, the law prefers to achieve the objectives of limitation, it is not suggested that the Statute always prefers to draw a balance in favour of its own policy and against the claims of ownership. For it quite certainly does not seek to promote the objectives of

limitation in all circumstances and at any price. Quite clearly, the need for fairness and justice to individual owners is taken into account and special provision is made for special circumstances. Thus, in certain circumstances (Chapter 12) extended periods of limitation are provided. The ordinary period is also extended in cases of disability and the running of time is postponed in cases of fraud, concealment and mistake (Chapter 11). It is therefore submitted here that the law represents a weighted balance, which was originally carefully formulated and which, in the present century, has been regularly reviewed and subject to adjustment.

But if it is accepted that the law does represent a balance, is that balance appropriately drawn? In particular, is the qualified guarantee of security of title provided by the Statute adequate?

A number of factors might be thought to affect the quality of the statutory guarantee, of which the more important are mentioned again here. The most obvious of those factors are the exceptions which the Statute itself has deliberately created. Clearly, the Statute does not absolutely guarantee that all claims are barred after 12 years, since it contains cases in which a longer limitation period is prescribed and other cases in which extensions or exceptions to the basic period are permitted. But it was concluded in Chapter 8 (leases), Chapter 10 (trusts), Chapter 11 (disability, fraud, concealment and mistake) that, for a variety of reasons, the various exceptions do not in practice significantly interfere with the quality of the statutory guarantee.

Although the express exceptions contained in the legislation are the most obvious factors which affect the quality of the statutory guarantee of security of title, they are not alone in having that affect. Two other

considerations in particular are also relevant and deserve mention. First, the Statute does not provide an absolute guarantee because it does not always act with absolute certainty. It cannot do so, for it utilises the concept of adverse possession. And as Chapter 5 attempted to show, adverse possession is not always unmistakeable or readily ascertainable, nor is its commencement always easy to prove years after the event. In this instance, therefore, the frame of the Act itself indirectly qualifies (to a limited extent) the nature of the statutory guarantee.

The second factor which ought to be noted here as affecting the quality of the statutory guarantee is not contained in the Act itself, but is the result of judicial decisions. In a number of instances, the balance struck by the legislation between the need for certainty and the danger of hardship to owners does not seem to have appealed to the judiciary. On occasion, hard cases of denial of a remedy to an owner seem to have tempted the Courts to strain interpretation of the legislation against the party pleading the Statute.

It is difficult to say precisely why certain judges should so readily have succumbed to this temptation. The reports are generally devoid of any explanation. It is quite possible that, in some cases, in reaching a decision, the Court has privately weighed the aims of the limitation legislation, has measured the statutory scheme, and has found it wanting. [See the rare example in **Locke v. Mathews** (1863) 13 C.B.N.S. 753, 761, Erle C.J.] In other cases, judicial lack of sympathy with (or even knowledge of) the concealed aims of the Statute may be a more likely explanation (see Chapter 1).

But whatever the explanation, when such instances do occur they may radically effect the quality of the statutory guarantee. The most noticeable recent example of this is the line of decisions connected with the **Wallis** case (Chapter 7); decisions which, if unchallenged, would have entirely nullified the Statute. **Wallis** has now been laid to rest. But the more recent decision in **Hyde v. Pearce** (Chapter 7) has a similar almost unlimited capacity for mischief.

However, criticism of decisions which are not "founded on large and mature views" of the Statute (Hayes, Conv., 5th. ed., 1840, 272) must be taken in context. For decisions in this category are undoubtedly outweighed by the many examples of rules developed or refined by the courts which either positively promote the objects of the legislation, or which at least achieve a fair result for owners without noticeably impinging on the operation of the Act. In this category, it is suggested, we ought probably to place the doctrines of tenant's encroachments; the infant's bailiff; the rule in **Heath v. Pugh** (Chapter 9); and the requirement of adverse possession as established in **Trustees Agency v. Short** (Chapter 5). The writer would also put in this category the decision in **Fairweather v. St. Marylebone,** despite the criticisms of it which were reviewed in Chapter 13.

So much, then, for the major factors affecting the quality of the statutory guarantee of title and so much also for the second aim of this thesis. On this basis, in concluding generally on the question whether the Statute is appropriately framed, it is submitted that, although the Statute is qualified in certain important respects, nevertheless the guarantee is adequate in practice.

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